STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Pat M. Donofrio, P.J., Hon. Henry William Saad, Hon. Kathleen Jansen

RONNISCH CONSTRUCTION GROUP, INC., a Michigan corporation,

Plaintiff-Appellee,

vs.

LOFTS ON THE NINE, LLC, a Michigan limited liability company, *et al.*,

Defendant-Appellant.

Supreme Court Docket No. 150029

Court of Appeals Docket No. 314195

Oakland County Circuit Court Case No. 09-105768-CH

AZD ASSOCIATES, INC., a Michigan corporation,

Plaintiff,

vs.

R.S.W. DEVELOPMENT GROUP II, LLC, a Michigan limited liability company, *et al.*

Defendants.

_____/

CONSOLIDATED WITH:

Oakland County Circuit Court Case No.: 10-108657-CH

BRIEF ON APPEAL – APPELLEE RONNISCH CONSTRUCTION GROUP, INC.

***** ORAL ARGUMENT REQUESTED *****

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STATEMENT OF THE BASIS FOR JURISDICTION

The Michigan Supreme Court has jurisdiction to entertain Defendant-Appellant's Application for Leave to Appeal pursuant to MCR 7.301(A)(2) and MCR 7.302(C)(4)(a).

Plaintiff-Appellee Ronnisch Construction Group, Inc. ("Ronnisch Construction" or "RCG"), a construction lien claimant under MCL §§ 570.1101 *et seq.* (the Construction Lien Act or "CLA"), seeks enforcement of its rights under the CLA including an award of its attorneys' fees and costs under MCL § 570.1118(2). RCG's attorneys' fees and costs were reasonably and necessarily incurred in the litigation of RCG's claim to be paid for the improvements RCG made to the real property of Lofts on the Nine ("LOTN") in Ferndale, Michigan.

In a motion before the Oakland County Circuit Court, Ronnisch Construction attempted to seek its attorneys' fees and other costs pursuant to the CLA, and in an *Opinion and Order of the Circuit Court* signed and dated on April 24, 2012, the Circuit Court denied RCG's motion. A copy of the Circuit Court's *Opinion and Order of the Circuit Court* is at **App. 119a-129a** (together with the Court's supplemental *Order* dated May 14, 2012 requiring the discharge of RCG's construction lien and *lis pendens* in furtherance of the *Opinion and Order of the Circuit Court* dated April 24, 2012, **App. 159b**). A final order was entered by the Circuit Court as of December 27, 2012 (see the *Amended Order of Dismissal* at **App. 160b-162b**).

On January 8, 2013, Ronnisch filed its claim of appeal as to the circuit court's erroneous rulings which denied RCG the opportunity to seek attorneys' fees under MCL 570.1118(2). By its written *Opinion* dated July 24, 2014, the Court of Appeals reversed the circuit court as follows:

> [W]e vacate the portion of the circuit court's opinion and order denying plaintiff's request for attorney fees because the circuit court erroneously believed that it lacked discretion to award attorney fees.... The portion of the circuit court's order denying plaintiff's request for attorney fees is vacated, and we remand for proceedings consistent with this opinion.

Opinion of the Court of Appeals at page 7.

On September 4, 2014, LOTN filed its Application for Leave to Appeal with the Michigan Supreme Court. On September 26, 2014, RCG filed its Response in Opposition to the Application for Leave. On October 16, 2014, LOTN filed its Reply in Support of the Application for Leave. On April 23, 2015, the Michigan Supreme Court issued its Order granting leave to appeal, and held:

> On order of the Court, the application for leave to appeal the July 24, 2014 judgment of the Court of Appeals is considered and, and it is GRANTED. The parties shall address whether the Court of Appeals erred in holding that the plaintiff contractor, who filed a claim of lien under the Construction Lien Act (CLA), MCL 570.1101 *et seq.*, and then filed a circuit court action against the defendant property owner, alleging breach of contract, foreclosure of lien, and unjust enrichment claims, was entitled to an award of attorney fees as a "prevailing party" under MCL 570.1118(2), when the plaintiff prevailed in binding arbitration on its contact claims, but neither then arbitrator nor the circuit court resolved the plaintiff's foreclosure of lien claim. See HA Smith Lumber & Hardware Co v Decina, 480 Mich 987 (2007).

STATEMENT OF QUESTIONS PRESENTED

I. Should the Michigan Supreme Court **AFFIRM** the July 24, 2014 judgment of the Court of Appeals holding that the plaintiff contractor, who filed a claim of lien under the Construction Lien Act (CLA), MCL 570.1101 *et seq.*, and then filed a circuit court action against the defendant property owner, alleging breach of contract, foreclosure of lien, and unjust enrichment claims, was entitled to an award of attorney fees as a "prevailing party" under MCL 570.1118(2), when the plaintiff prevailed in binding arbitration on its contract claim, but neither the arbitrator nor the circuit court resolved the plaintiff's foreclosure of lien claim?

Plaintiff-Appellee's answer:	YES
The Court of Appeals' answer:	YES
Defendant-Appellant's answer:	NO
The Oakland County Circuit Court's answer:	NO

II. Should the Michigan Supreme Court hold that the Court of Appeals properly considered and distinguished the Supreme Court's decision in H.A. Smith Lumber & Hardware Co. v. Decina, 480 Mich. 987 (2007) in light of the differing facts of the two cases and **AFFIRM** that the Court of Appeals correctly held that the plaintiff contractor was entitled to an award of attorney fees as a "prevailing party" under MCL § 570.1118(2) in light of the statutory mandate to liberally construe the CLA to protect prevailing lien claimants?

Plaintiff-Appellee's answer:	YES
The Court of Appeals' answer:	YES
Defendant-Appellant's answer:	NO
The Oakland County Circuit Court's answer:	NO

NATURE OF ORDER APPEALED

Plaintiff-Appellee Ronnisch Construction Group, Inc. ("Ronnisch Construction" or "RCG") entered into a contract with Defendant-Appellant Lofts on the Nine, LLC ("LOTN") to construct the new "Lofts on Nine" building on Nine Mile Road in Ferndale, Michigan. The contract contained a mandatory arbitration provision which requires that "*[a]ny Claim arising out of or related to the Contract* ... shall ... be subject to arbitration". LOTN withheld substantial payment from RCG for improvements that RCG made to LOTN's real property, and RCG recorded a claim of lien against the property at the Oakland County Register of Deeds. Subsequently, Ronnisch Construction filed suit in the Oakland County Circuit Court for breach of contract and lien foreclosure (as required by MCL § 570.1118(1) which requires that, *"An action to enforce a construction lien through foreclosure shall be brought in the circuit court for the county where the real property described in the claim of lien is located"*), and the circuit court action was then stayed pending the litigation of the underlying dispute in arbitration.

Ronnisch Construction prevailed in the arbitration and, on January 26, 2012, an Award was made in RCG's favor in the principal amount of $450,820.36 plus interest. (In the Award, Ronnisch Construction also successfully defended against almost $2 million of counter-claims asserted by LOTN.) Further, in the Award, the arbitrator specifically reserved for the Circuit Court the issue of attorneys' fees and costs due to Ronnisch Construction under MCL § 570.1118(2), and Ronnisch Construction petitioned the Court to lift the stay and for an award of its actual attorneys' fees and costs under the statute. In that regard, the Circuit Court found at page 5 of its Opinion and Order:

> After first providing labor and materials for the Project on May 30, 2007, RCG filed its claim of lien on June 2, 2009, which was within 90 days of April 24, 2009, its last working day on the Project as of the lien filing date. Therefore, ***RCG perfected its lien within the timeline required under Michigan law***. (*Emphasis added.*)

But, the Circuit Court then denied Ronnisch Construction's motion because, it held, "the Court does not have the discretion to award RCG its attorneys' fees and costs under the Michigan Construction Lien Act" because on February 16, 2012, LOTN paid RCG the principal amount of the Award. *Opinion and Order of the Circuit Court* at page 11. Despite the fact that the Arbitration Award was a final decision as to the value of RCG's construction lien, the Circuit Court (erroneously) relied on the matter of H.A. Smith Lumber & Hardware Co. v. Decina, 480 Mich. 987, 742 N.W.2d 120 (2007) and (incorrectly) concluded that LOTN's post-Award payment prevented the Court from adjudicating RCG's claim and that RCG could not "be deemed to be a prevailing lien claimant in this matter". *Opinion and Order of the Circuit Court* at page 11. The Circuit Court did not state any reliance on any section of the CLA in making its ruling. On the other hand, the Circuit Court did recognize at pages 7-9 of its Opinion and Order that "the Michigan Court of Appeals has addressed instances where a lienee submitted its payment on a lien just before the lien foreclosure trial began or after the final judgment was entered" and that the matter of Solution Source, Inc. v. LPR Associates Limited Partnership, 252 Mich.App. 368, 652 N.W.2d 474 (2002) held at page 381 "that satisfaction of a lien does not bar a lien claimant who is the prevailing party from recovering" its attorneys' fees and costs under MCL § 570.1118(2). (See also Bosch v. Altman, 100 Mich.App. 289, 298 N.W.2d 725 (1980).) Still, the Circuit Court apparently found such cases unpersuasive or otherwise elected not to follow their holdings.[1]

[1] On May 14, 2012, the Court also issued its supplemental Order dated May 14, 2012 requiring the discharge of RCG's construction lien and lis pendens (in furtherance of the Court's decision in its April 24, 2012 Opinion and Order).

On January 8, 2013, RCG filed its claim of appeal.[2] On July 24, 2014, the Court of Appeals properly held that "[b]ecause the circuit court erroneously concluded that it was precluded from considering awarding attorney fees under MCL 570.1118(2), we vacate the portion of the order dealing with attorney fees and remand". *Opinion of the Court of Appeals*, at page 1 **(App. 131a)**. The Court of Appeals elaborated by holding at page 7 of its *Opinion* **(App. 137a)**:

> [W]e hold that pursuant to Bosch and Solution Source, plaintiff was a prevailing lien claimant under MCL 570.1118(2). The fact that the lien amount was established by an arbitrator instead of a court or jury does not compel us to reach a different conclusion. As a result, we vacate the portion of the circuit court's opinion and order denying plaintiff's request for attorney fees because the circuit court erroneously believed that it lacked discretion to award attorney fees. [T]he circuit court is not ***required*** to award attorney fees on remand. Instead, on remand, the circuit court simply is to exercise its discretion in deciding whether to award attorney fees. MCL 570.1118(2) states that "[t]he court ***may*** allow reasonable attorneys' fees to a lien claimant who is the prevailing party." (*Emphasis added.*) It is well established that the use of the word "may" connotes permissive, not mandatory action. *AFSCME v Detroit*, 267 Mich App 255, 260; 704 NW2d 712 (2005).
>
> The portion of the circuit court's order denying plaintiff's request for attorney fees is vacated, and we remand for proceedings consistent with this opinion.

Plaintiff-Appellee respectfully submits that the July 24, 2014 judgment of the Court of Appeals is correct in all of its particulars **(App. 131a-137a)**. The Court of Appeals properly held that the Circuit Court reversibly erred in denying its motion for attorneys' fees and costs and in narrowly construing the CLA to hold that Ronnisch Construction could not be a "prevailing lien claimant" such that RCG had lost its rights under the CLA because it accepted payment of the

[2] Because the matter between RCG and LOTN was consolidated with the project architect's (AZD Associates') lawsuit against LOTN, a final order in the consolidated cases was not entered by the Circuit Court until December 27, 2012; however, the caption on the final order inadvertently omitted the consolidated case numbers, and the Circuit Court entered an amended final order on January 23, 2013. The Court of Appeals reviewed the recorded and opted to consider RCG's January 8, 2013 claim of appeal (which pre-dated the January 23, 2013 amended final order) as an application for leave to appeal which the Court of Appeals granted. *Opinion of the Court of Appeals*, at page 1, footnote 1.

Arbitration Award more than two years after litigation commenced and after the claims had been fully litigated in the underlying arbitration. Further, the Circuit Court erroneously concluded that the underlying arbitration was not a part of the action to enforce RCG's construction lien (when in fact, the arbitration established the value of the construction lien), and the Circuit Court erroneously concluded that for RCG to be a "prevailing lien claimant", it would have needed to take the matter through to the actual foreclosure of its construction lien (presumably including a judgment for a sheriff's sale). *Opinion of Court of Appeals* at page 6. The Court of Appeals found that the express statutory purpose of the CLA is to ensure that non-paying property owners pay those with whom they contract to improve their real property (and to compensate such lien claimants for the attorneys' fees after withholding payment due). *Opinion of Court of Appeals* at page 4. RCG submits that it would be a manifest injustice which is contrary to the purpose of the Act to require that RCG should have refused payment from LOTN after the conclusion of binding arbitration so that RCG's statutory right to attorneys' fees would not have been negated.

Therefore, Plaintiff-Appellee RCG respectfully submits that the Michigan Supreme Court should **AFFIRM** the July 24, 2014 judgment of the Court of Appeals, and the matter should be remanded to the Circuit Court for proceedings consistent with said *Opinion*.

STATEMENT OF FACTS

This is a construction lien foreclosure matter in which the Owner of the Project (Lofts on the Nine, LLC, "LOTN") and the General Contractor (Ronnisch Construction Group, Inc., "RCG") entered into a standard form contract published by the American Institute of Architects[3] to construct a new "lofts-style" building in Ferndale, Michigan which includes commercial units on the ground floor and residential units on the upper floors. In addition, this matter involved the lien claims of various others including several subcontractors that performed work on the Project,[4] the Project architect, and the Project engineer. The Project was completed and LOTN has had beneficial use of the building since May 2009, however, LOTN refused to pay RCG substantial amounts due for its work (and the work of several of its subcontractors). Thus, on June 2, 2009, RCG filed its Claim of Lien with the Oakland County Register of Deeds.

On November 25, 2009 (and in accordance with MCL § 570.1118(1) of the Construction Lien Act), RCG filed its Complaint in the Oakland County Circuit Court against Lofts on the Nine, LLC for Breach of Contract (Count I) and Foreclosure of Lien (Count II). In addition, because the AIA Form Contract between LOTN and RCG included an arbitration provision (see Section 4.6 of the General Conditions at **App. 37a-38a**), arbitration became the venue for the underlying factual dispute between RCG and LOTN.

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[3] The Contract between RCG and LOTN is titled "Standard Form of Agreement Between Owner and Contractor Where the Basis for Payment is the Cost of the Work Plus a Fee with a Negotiated Guaranteed Maximum Price", AIA Document A-111(1997 Edition) and the "General Conditions for the Contract for Construction", AIA Document A-201(1997 Edition). In that regard, note that AIA contracts are ubiquitous in the construction industry (both in Michigan and nationally), and therefore, had the Circuit Court's erroneous holding been allowed to stand, this matter would have had far-reaching negative consequences in that AIA form contracts (and form contracts from many other construction trade associations) typically contain arbitration provisions such as is at issue in this matter. However, the *Opinion of the Court of Appeals* has now corrected that error.

[4] Note that all of Ronnisch Construction's subcontractor lien claimants have been paid out of the funds RCG received from the LOTN after the Arbitration Award, and their actions have been dismissed by the Circuit Court. See the Dismissal dated April 2, 2012 attached at **App. 154b-158b**.

On October 28, 2010, the parties executed a Stipulated Order in which they agreed that the portion of the case which is Oakland County Case No. 09-105768-CH would be stayed pending the outcome of the arbitration between Ronnisch Construction and LOTN (American Arbitration Association Case No. 54-110-01051-10) (see **App. 89a-91a**).[5] The parties also stipulated that the Circuit Court would "retain jurisdiction to enforce any arbitration award".

A companion lien foreclosure action was also filed the by Project Architect claiming that it was also unpaid by LOTN (titled AZD Associates, Inc. v. R.S.W. Development Group II, LLC, Lofts on the Nine, LLC, *et al.*, Oakland County Circuit Court Case No. 10-108657-CH), and on April 5, 2011, that matter was consolidated with Case No. 09-105768-CH. The consolidated matter was also stayed pending the outcome of the arbitration (**App. 1b-3b**). The arbitration proceedings were summarized at page 2 of the *Opinion of the Court of Appeals*:

> The contract called for the construction of a loft-style condominium building in Ferndale, Michigan for the price of approximately $6 million and provided that "[a]ny Claim arising out of or related to the Contract" be submitted to arbitration. Plaintiff last provided labor or materials on April 24, 2009. Defendant had paid plaintiff almost $5.5 million, resulting in a deficiency of $626,163.73. As a result, plaintiff filed a claim of lien in the Oakland County Register of Deeds in June 2009.
>
> Because of the deficiency, on November 25, 2009, plaintiff filed a complaint against defendant in circuit court, alleging three counts: breach of contract, foreclosure of lien, and unjust enrichment. Additionally,

[5] Contrary to the misleading statements at page 1 and 25 in LOTN's Brief, there was no threat from a motion "to enforce the parties' agreement to arbitrate" at the time the parties signed the stipulation to stay the circuit court action pending the outcome of the arbitration; LOTN's suggestion is simply false. In actuality, RCG at all times was forthright about the arbitration provision in the construction contract (e.g., see RCG's Complaint at paragraph 17 and the three prayers for relief). RCG actually concurred in the request for the Court to order the matter to arbitration, and RCG also requested that the subcontractor lien claims be stayed pending the arbitration between RCG and LOTN. Moreover, MCL § 570.1118(1) requires that an action to enforce a construction lien "***shall be brought*** in the circuit court for the county where the real property is located" (*emphasis added*), and RCG properly abided by that statutory requirement. And in its Complaint, RCG properly noted the arbitration provision in the construction contract. LOTN's assertions that RCG somehow "breached" the construction contract by following MCL § 570.1118(1) and filing the lien foreclosure action is false and frivolous. E.g., see LOTN's Brief at page 1, F.N.1 and page 25.

> because the contract required that claims be submitted to arbitration, the parties stipulated to stay the proceedings at circuit court and proceeded with arbitration. At arbitration, defendant asserted claims of its own, alleging that it incurred between $1.1 million and $1.5 million in damages because of faulty or incomplete work done by plaintiff.

Arbitration hearings were held in the summer and autumn of 2011, and as noted at page 2 of the *Opinion of the Court of Appeals*:

> On January 26, 2012, the arbitrator issued its ruling. The arbitrator awarded plaintiff $626,163.72 for "[d]irect damages for work performed under the Construction Contract" and $9,895.00 for "[r]eimbursement for additional Faucet Claim." Thus, the total awarded on plaintiff's claims was $636,058.72.[6] However, the arbitrator specifically declined to address plaintiff's request for attorney fees as a prevailing lien claimant under MCL 570.1118(2) and expressly "reserved for the Circuit Court" that issue. On defendant's counter-claims, the arbitrator awarded defendant $185,238.36, resulting in a net award of $450,820.36 [plus interest][7] to plaintiff.

The Arbitration Award is attached hereto at **App. 93a-95a.** In addition, the Arbitrator held in the Award as follows:

> The Arbitrator makes no award as to RCG's claim for attorney fees and costs under MCL § 570.1118(2), and the issue of such attorney fees and costs under the Construction Lien Act is reserved for the Circuit Court in the underlying lawsuit, Ronnisch Construction

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[6] Note that there is a typographical error of $0.01 between the amount in the Arbitration Award (**App. 93a-95a**) and the amount noted on the Claim of Lien (**App. 73a**), however, that *de minimis* discrepancy is immaterial to this matter.

[7] The net amount of the Award in favor of RCG and against LOTN, including interest per the Award through February 16, 2012, is $485,319.74. In that regard, we note a minor mathematical correction (which is **not** determinative of the legal issues herein) – the Circuit Court mistakenly stated that the arbitration award represented "approximately 56% of RCG's original contract claim" (*Opinion and Award of Circuit Court* at page 4), however, the award was actually 72% of RCG's lien claim (*i.e.,* $450,820.36/$626,163.72 = .72) plus interest in the amount of $34,499.38. (In other words, $626,163.72 is the amount of RCG's claim of lien – which does not include interest – and the arbitrator awarded RCG $450,820.36 as the uncompensated value of RCG's improvements to LOTN's real property.) The confusion appears to have resulted from the complex manner in which the Arbitrator calculated the parties' competing claims for interest. In any event, the *Opinion of the Court of Appeals* corrected this error when it found in F.N. 4, page 3, "While defendant asserted that the amount awarded was less than 70 percent of the amount listed on the lien, our review shows that the amount awarded actually was 72 percent of the amount listed on the lien ($450,820.36/$626,163.73 = 0.720)."

> Group, Inc. v. Lofts on the Nine, LLC, et al., Oakland County Circuit Court Case No. 09-105786-CH.
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> ***
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> This Award expressly does **not** address the issue of RCG's claim for attorney fees and costs under MCL § 570.1118(2) which is not being addressed by the Arbitrator, and no ruling is made in that regard. The issue of such attorney fees and costs per MCL § 570.1118(2) is hereby reserved for the Court in the underlying lawsuit of Ronnisch Construction Group, Inc. v. Lofts on the Nine, LLC, et al., Oakland County Circuit Court Case No. 09-105786-CH.

As noted at page 2 of the *Opinion of the Court of Appeals*, RCG then moved the Circuit Court for its attorneys' fees and costs.

> On February 21, 2012, plaintiff filed a motion to lift the stay, to confirm the arbitration award, and to request attorney fees and costs under MCL 570.1118(2). Plaintiff asserted that it was a prevailing lien claimant and was entitled to attorney fees and costs, totaling $310,125.25.
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> Defendant filed a response and argued that the motion should be denied in total because, at the outset, it already had satisfied the arbitration award by paying plaintiff shortly after the arbitrator made his ruling. Furthermore, defendant argued that no attorney fees were warranted because once plaintiff's breach of contract claim was settled, it rendered its lien foreclosure claim moot. Defendant also argued that plaintiff cannot be considered as prevailing in arbitration because defendant reasonably disputed paying the final 10 percent of the contract price because of numerous contract breaches on plaintiff's behalf.

On February 29, 2012, oral argument of the matter was heard before the Circuit Court. On April 24, 2012, the Circuit Court issued its written *Opinion and Order of the Circuit Court* which denied RCG's motion (**App. 119a-129a**), and the Circuit Court reasoned as follows:

> As [defendant] paid [plaintiff] the amount [defendant] owed pursuant to the Arbitration Award on February 16, 2012[8] and [plaintiff's] lien

[8] LOTN goes to great lengths to portray its eleventh hour payment of the Arbitration Award as a noble or honorable end to a "good faith" dispute over a modest percentage of the construction contract. In actuality, LOTN withheld hundreds of thousands of dollars from the contractors that built LOTN's building and improved LOTN's property. And, LOTN had the beneficial use of RCG's work for over two years while dragging RCG through costly litigation and forcing RCG to defend itself against over a $1 million in unfounded counterclaims. Moreover, LOTN makes the absurd argument that it was a "breach" of the construction contract (or somehow wrong) for RCG to have filed its lien foreclosure Complaint (i.e., LOTN states, "RCG never should have initiated its action by first filing a Complaint in the circuit court", LOTN's Brief at page 24; rather RCG should

> foreclosure claim was not adjudicated by this Court or the Arbitrator in the AAA case, [plaintiff] cannot be deemed to be a prevailing lien claimant in this matter. Therefore, the Court does not have the discretion to award [plaintiff] its attorney fees and costs under the Michigan Construction Lien Act.

The consolidated matters were dismissed by the Circuit Court as of December 27, 2012 (**App. 160b-162b**). Then, on January 8, 2013, RCG filed its claim of appeal. Thereafter, RCG and LOTN both filed appellate briefs, and oral argument was heard by the Court of Appeals.

On July 24, 2014, the Court of Appeals issued its written *Opinion* which reversed the Circuit Court and "vacate[d] the portion of the circuit court's opinion and order denying plaintiff's request for attorney fees because the circuit court erroneously believed that it lacked discretion to award attorney fees". **(App. 131a-137a.)** The Court of Appeals further held, "we remand for proceedings consistent with this opinion" and "on remand, the circuit court simply is to exercise its discretion in deciding whether to award attorney fees". Id., at page 7.

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have "expeditiously arbitrated its dispute any obtained prompt payment of any net award in its favor without ever appearing before the circuit court". LOTN's argument is foolish, and LOTN must know that "[p]roceedings for the enforcement of a construction lien ... shall not be brought later than 1 year after the date the claim of lien was recorded", MCL § 570.1117(1) (and, in this matter, the arbitration award was not rendered until will over two years after RCG's lien was recorded). In actuality, the CLA was drafted to protect contractors from precisely the type of property owner as LOTN: a property owner that withholds payment for as long as possible for work performed.

SUMMARY OF ARGUMENTS

The July 24, 2014 judgment of the Court of Appeals correctly held that RCG, who filed a claim of line under the Construction Lien Act (CLA), MCL §§ 570.1101 *et seq.*, and then filed a circuit court action against the defendant property owner, alleging breach of contract, foreclosure of lien, and unjust enrichment claims, was entitled to an award of attorney fees as a "prevailing party" under MCL § 570.1118(2), when RCG prevailed in binding arbitration on its contract claim, but neither the arbitrator nor the circuit court resolved the plaintiff's foreclosure of lien claim. Moreover, the Court of Appeals correctly distinguished this matter from the Supreme Court's holding in H.A. Smith Lumber & Hardware Co. v. Decina, 480 Mich. 987 (2007) because: (a) the facts of Decina are materially different from this matter because the putative lien claimants in Decina could never have a valid claim of lien as a matter of law whereas the Circuit Court in this matter found that RCG had perfected its lien; and (b) the putative lien claimants in Decina "lost on their lien claim" whereas neither the arbitrator nor the circuit court resolved the plaintiff's foreclosure of lien claim in this matter.

Specifically, at page 1 of the *Opinion of the Court of Appeals*, the Court properly held:

> Because the circuit court erroneously concluded that it was precluded from considering awarding attorney fees under MCL 570.1118(2), we vacate the portion of the order dealing with attorney fees and remand.

Thus, the Circuit Court erred in that it did not exercise any discretion whatsoever as to whether to award attorneys' fees under the Construction Lien Act because the Circuit Court misinterpreted the statute when it held that it "does not have the discretion to award RCG its attorney fees and costs under the Michigan Construction Lien Act". *Opinion and Order of the Circuit Court* at page 11 **(App. 119a-129a)**. The Circuit Court effectively abrogated Ronnisch Construction's statutory right to seek an award of any attorneys' fees and costs (in any amount)

because LOTN made an eleventh hour payment of the principal amount of the Arbitration Award (which payment was made only after the trial of the issues in the arbitration proceedings).

In that regard, it is undisputed that the Arbitration Award was final and binding on the parties, and we submit that it would be absurd to read the CLA to require Ronnisch Construction to refuse payment of the principal amount of the Arbitration Award in order to avoid being divested of its rights under the CLA. Moreover, such a result would be counter to the statutory mandate of liberal construction to protect the lien claimant's right to payment, and it is not supported by any provision of the statute. Thus, we respectfully submit that the judgment of the Court of Appeals was proper in all respects, and the Circuit Court's holding was based on an error of law. In accordance with the *Opinion of the Court of Appeals*, this matter should be remanded to the Circuit Court so that Ronnisch Construction may seek an award of attorneys' fees and costs under MCL § 570.1118(2).

ARGUMENT

Plaintiff-Appellee submits that the July 24, 2014 *Opinion of the Court of Appeals* is correct in all of its particulars and should be **AFFIRMED**.

STANDARD OF REVIEW

At page 3 of the *Opinion of the Court of Appeals*, the Court properly stated the standard of review as follows:

> This Court reviews a circuit court's decision on whether to award attorney fees under the Construction Lien Act for an abuse of discretion. CD Barnes Assocs, Inc v Star Heaven, LLC, 300 Mich App 389, 425; 834 NW2d 878 (2013). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." Woodard v Custer, 476 Mich 545, 557; 719 NW2d 842 (2006). ***Likewise, a court abuses its discretion when it makes an error of law.*** In re Waters Drain Drainage Dist, 296 Mich App 214, 220; 818 NW2d 478 (2012). (*Emphasis added.*)

In other words, as a general proposition, a circuit court's decision as to whether to award attorneys' fees and costs under MCL § 570.1118(2) is reviewed for "abuse of discretion". For example, in Superior Products Co. v. Merucci Bros, Inc., 107 Mich.App. 153, 309 N.W.2d 188 (1981), the Court held at page 159:

> The awarding of attorney fees is within the discretion of the trial judge, and it will be upheld absent an abuse of discretion. Sturgis Savings & Loan Ass'n v. Italian Village, Inc., 81 Mich.App. 577, 584, 265 N.W.2d 755 (1978), William & Works, Inc. v. Springfield Corp., 76 Mich.App. 541, 551, 257 N.W.2d 160 (1977), lv. den. 402 Mich. 908 (1978).

But in this matter, ***the Circuit Court declined to exercise any discretion*** in awarding attorneys' fees because it held that "the Court does not have the discretion to award RCG its attorney fees and costs under the Michigan Construction Lien Act". *Opinion and Order of the Circuit Court* at page 11. In that regard, the Court of Appeals specifically noted that "a court abuses its discretion when it makes an error of law". In re Waters Drain, at 220.

And, at page 3 of the *Opinion of the Court of Appeals*, the Court also properly stated:

> This Court also reviews issues of statutory interpretation de novo. The primary goal of judicial interpretation of statutes is to discern the intent of the Legislature by examining the plain language of the statute. The starting point in every case involving construction of a statute is the language. . . . The court must consider the object of the statute in light of the harm it is designed to remedy and apply a reasonable construction that best accomplishes the purposes of the statute. [CD Barnes, 300 Mich App at 407-408 (citations and quotation marks omitted).]

The "established rules of statutory construction" were described by the Court in Michigan Educ. Ass'n v. Secretary of State, 488 Mich. 18, 793 N.W.2d 568 (2010) at pages 26-27:

> [T]he purpose of statutory construction is to discern and give effect to the intent of the Legislature. Accordingly, a Court must interpret the language of a statute in a manner that is consistent with the legislative intent. In determining the legislative intent, the actual language of the statute must first be examined. As far as possible, effect should be given to every phrase, clause, and word in the statute.

> When considering the correct interpretation, a statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. In defining particular words within a statute, a court must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. When a statute explicitly defines a term, the statutory definition controls. *(Citations and footnotes omitted).*

Moreover, "***[i]t is a recognized rule of statutory interpretation that the courts will not construe a statute so as to achieve an absurd or unreasonable result.***" Luttrell v. Department of Corrections, 421 Mich. 93, 106, 365 N.W.2d 74 (1984) *(emphasis added).*

With specific reference to the Construction Lien Act, the Court in Brown Plumbing and Heating, Inc. v. Homeowner Const. Lien Recovery Fund, 442 Mich. 179, 500 N.W.2d 733 (1993) stated at pages 187-189:

> Enacted in 1980, the Construction Lien Act seeks to achieve a dual protective purpose. ***It aspires to protect not only a lien claimant's right to payment for wages or materials,*** but also the landowner from multiple payments for the same services. Fischer-Flack, Inc. v. Churchfield, 180 Mich.App. 606, 447 N.W.2d 813 (1989). The preamble to the act sets forth its broadly defined purpose.
>
> > "AN ACT to establish, protect, and enforce by lien the rights of persons performing labor or providing material or equipment for the improvement of real property; to provide for certain defenses with respect thereto; to establish a homeowner construction lien recovery fund within the department of licensing and regulation; to provide for the powers and duties of certain state officers; to provide for the assessments of certain occupations; to prescribe penalties; and to repeal certain acts and parts of acts."
>
> Although a preamble is not to be considered authority for construing an act, it is useful for interpreting its purpose and scope. Malcolm v. East Detroit, 437 Mich. 132, 143, 468 N.W.2d 479 (1991); 2A Singer, Sutherland Statutory Construction (5th ed.), § 47.04, pp. 145–150.
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> ***
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> The fundamental rules of statutory construction are instructive in determining the applicability of [MCL § 570.1302]. On several occasions, this Court has held that where the provisions of a statute

> are clear and unambiguous, they are to be applied as written. Gilroy v. General Motors Corp. (After Remand), 438 Mich. 330, 341, 475 N.W.2d 271 (1991); Selk v. Detroit Plastic Products, 419 Mich. 1, 9, 345 N.W.2d 184 (1984). When construing statutory provisions, ***the court's task is to discover and effectuate the intent of the Legislature***. The legislative intent is to be derived from the actual language of a statute, and when the language is clear and unambiguous, no further interpretation is necessary. Storey v. Meijer, Inc., 431 Mich. 368, 429 N.W.2d 169 (1988). Where ambiguity exists, a court must give the statute a valid and reasonable construction that will reconcile any inconsistencies and give effect to all of its parts. Girard v. Wagenmaker, 437 Mich. 231, 238, 470 N.W.2d 372 (1991); Aikens v. Dep't of Conservation, 387 Mich. 495, 499, 198 N.W.2d 304 (1972). ***A court must also ascertain "the evil or mischief which it is designed to remedy, and will apply a reasonable construction which best accomplishes the statute's purpose."*** Pittsfield Charter Twp. v. Saline, 103 Mich.App. 99, 105, 302 N.W.2d 608 (1981). ***Remedial statutes are to be construed liberally in favor of the persons intended to be benefitted by the statute.*** Bierbusse v. Farmers Ins. Group, 84 Mich.App. 34, 37, 269 N.W.2d 297 (1978). *(Emphasis added.)*[9]
>
> ***
>
> Section 302 of the act provides a self-contained construction directive.
>
> > *"This act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and purposes of this act. Substantial compliance with the provisions of this act shall be sufficient for the validity of the construction liens provided for in this act, and to give jurisdiction to the court to enforce them." (Emphasis added and emphasis in original Court opinion.)*

And, the "evil or mischief" that the CLA is designed to remedy is to protect the rights of lien claimants for payment for the improvements that they make to real property together with reimbursement of attorneys' fees and expenses.[10]

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[9] Note that LOTN's Brief on appeal entirely ignores the remedial nature of the CLA and the statutory imperative that the CLA be liberally construed to effectuate its purposes (LOTN's argument would actually impose a "wrong" and "restrictive" standard of review on the CLA).

[10] We note that the CLA is also designed to protect property owners against being required to pay twice for improvements to their property, however, in light of the Arbitrator's finding that LOTN owed RCG the net principal amount of $450,820.36, that potential "evil or mischief" is clearly ***not*** at issue in this matter. Instead, LOTN withheld hundreds of thousands of dollars which

I. THE MICHIGAN SUPREME COURT SHOULD AFFIRM THE JULY 24, 2014 JUDGMENT OF THE COURT OF APPEALS WHICH HELD THAT THE PLAINTIFF CONTRACTOR, WHO FILED A CLAIM OF LIEN UNDER THE CONSTRUCTION LIEN ACT (CLA), MCL §§ 570.1101 *ET SEQ.*, AND THEN FILED A CIRCUIT COURT ACTION AGAINST THE DEFENDANT PROPERTY OWNER, ALLEGING BREACH OF CONTRACT, FORECLOSURE OF LIEN, AND UNJUST ENRICHMENT CLAIMS, WAS ENTITLED TO AN AWARD OF ATTORNEY FEES AS A "PREVAILING PARTY" UNDER MCL § 570.1118(2), WHEN THE PLAINTIFF PREVAILED IN BINDING ARBITRATION ON ITS CONTRACT CLAIM, BUT NEITHER THE ARBITRATOR NOR THE CIRCUIT COURT RESOLVED THE PLAINTIFF'S FORECLOSURE OF LIEN CLAIM.

In its July 24, 2014 *Opinion of the Court of Appeals* at pages 4 and 7, the Court correctly reasoned:

> The Construction Lien Act is remedial in nature and "sets forth a comprehensive scheme aimed at protecting the rights of lien claimants to payment for expenses and . . . the rights of property owners from paying twice for these expenses." Stock Bldg Supply, LLC v Parsley Homes of Mazuchet Harbor, LLC, 291 Mich App 403, 406-407; 804 NW2d 898 (2011). As such, it is to be "liberally construed to secure the beneficial results, intents, and purposes of this act." MCL 570.1302(1).
>
> The circuit court determined that it could not award attorney fees under this statute because plaintiff could not be considered a prevailing lien claimant. The court relied on the belief that the lien foreclosure claim was not adjudicated by it or the arbitrator and concluded that it did "not have the discretion to award [plaintiff] attorney fees and costs under the Michigan Construction Lien Act." We disagree.
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> ***
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> [W]e hold that pursuant to Bosch and Solution Source, plaintiff was a prevailing lien claimant under MCL 570.1118(2). The fact that the lien amount was established by an arbitrator instead of a court or jury does not compel us to reach a different conclusion. As a result, we vacate the portion of the circuit court's opinion and order denying plaintiff's request for attorney fees because the circuit court erroneously believed that it lacked discretion to award attorney fees.

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was due to RCG, and LOTN held that money for years while it squeezed RCG in the litigation (and during the depths of the economic crisis in Michigan).

A. RCG was Entitled to Confirmation of the Arbitration Award by the Circuit Court Under MCR 3.602(I), and RCG was Entitled to Seek Its Attorneys' Fees and Costs from LOTN Under MCL 570.1118(2).

The underlying arbitration in this matter was conducted pursuant to the arbitration provision in the contract between RCG and LOTN (see **App. 37a-38a**) and the Court's Orders dated October 28, 2010 and April 5, 2011. Arbitration hearings were held on July 18, 20, 21 and 22, 2011 and on August 1, 3 and 12, 2011, in Southfield, Michigan, and on December 2, 2011, in Detroit, Michigan. In addition, a site-review with the arbitrator was conducted on July 20, 2011 in Ferndale, Michigan. Post hearing Briefs and Reply Briefs were filed by the parties, and the arbitration was closed on January 6, 2012.

On January 26, 2012, the arbitrator issued his Award (**App. 93a-95a**). It is undisputed that the arbitrator did not exceed his authority, that the Award is intelligent on its face, and that the Award was final and binding on the parties. At the time RCG filed its motion to the Court (February 21, 2012), more than twenty-one days had elapsed after the Award was issued and no proceedings were instituted by LOTN to vacate the Award. The Award was a finding that RCG was due the net amount of $450,820.36, and it also established the net value of the improvements to LOTN's property for which RCG was not paid (*i.e.,* the value of RCG's lien). Moreover, ***the Award expressly reserved the issue of attorneys' fees and costs under the CLA for the Circuit Court, and the Court's October 28, 2010 Order expressly retained jurisdiction to enforce the Award*** (**App. 89a-91a**).

Therefore, even though LOTN paid the principal amount of the Arbitration Award (after the lengthy litigation was concluded), RCG had other rights under the CLA (including the right to seek attorneys' fees) and RCG was entitled to have the Award confirmed by the Circuit Court pursuant to MCR 3.602(I). And, RCG was entitled to make its claim for an award of its attorneys' fees and costs against LOTN pursuant to MCL § 570.1118(2).

B. **Under the Construction Lien Act and At All Times Relevant In This Matter, Ronnisch Construction had a Valid Construction Lien Against the Real Property that is the Lofts on the Nine Project.**

It is undisputed that RCG contracted with LOTN to supply labor and material to construct the "Lofts on the Nine" Project, and in constructing the Lofts on the Nine building, RCG improved the real property that is the subject of this dispute. In that regard, and after considering all of the claims of both RCG and LOTN (except for RCG's request for attorneys' fees and costs under the Construction Lien Act), the Arbitrator found that LOTN owed RCG the net principal amount of $450,820.36 (and the amount due as of February 16, 2012, including interest per the award, was $485,319.74).

Thus, in accordance with the Michigan Construction Lien Act, RCG had a valid construction lien against the LOTN real property, and RCG's lien was even recognized by the Circuit Court which found, "***RCG perfected its lien within the timeline required under Michigan law***". *Opinion and Order of the Circuit Court* at page 5. Unfortunately, the Circuit Court never resolved RCG's lien foreclosure claims which included a request for attorneys' fees under MCL § 570.1118(2).[11]

Under the CLA, Construction Liens are defined at MCL § 570.1107(1) which states:

> Each contractor, subcontractor, supplier, or laborer who provides an improvement to real property shall have a construction lien upon the interest of the owner or lessee who contracted for the improvement to the real property....

[11] Note that RCG having perfected its lien is one of several critical distinctions between this matter and the facts in HA Smith Lumber & Hardware v. Decina, 480 Mich. 987 (2007). The issue will be argued in detail below, however, note that where RCG had perfected its lien, the lien claimants in Decina "lost on their lien claim". Decina at 988.

In other words, under MCL § 570.1107(1), ***RCG had a construction lien that arose at the time when RCG made improvements to the real property***[12] (and the statute also requires that to enforce the construction lien, it must be recorded within 90 days of last supplying labor or material – see MCL § 570.1111). In that regard, RCG's Construction Lien was recorded against the real property of the Project on June 2, 2009 at Liber 41208, Page 556 with the Oakland County Register of Deeds (**App. 73a**[13]), and as stated in RCG's Construction Lien: (a) RCG first provided labor or materials for the improvement of the real property which is the Lofts on the Nine Project on May 30, 2007; (b) RCG's last day worked on the Project was April 24, 2009 (and additional work was performed after that date). These undisputed facts were also verified in the Affidavit of RCG president, Bernd Ronnisch at **App. 4b-8b**; LOTN offered nothing to rebut these undisputed (and true) facts.

Therefore, RCG met the requirements of MCL § 570.1111 which states:

> ***[T]he right of a contractor***, subcontractor, laborer, or supplier to a construction lien created by this act ***shall cease to exist unless, within 90 days after the lien claimant's last furnishing of labor or material*** for the improvement, pursuant to the lien claimant's contract, ***a claim of lien is recorded in the office of the register of deeds*** for each county where real property to which the improvement was made within the county where the claim of lien has been recorded. (Emphasis added).

Thus, the lien rights of the contractor arise at the time its work is performed (*i.e.,* at the time improvements to the property are made), but those rights will "cease to exist" if the lien claim is not

[12] In its Brief, LOTN cites to several cases for the proposition that "once the underlying debt is extinguished, so to is the security" (*LOTN's Brief* at 14), and in LOTN's view, because it made an eleventh hour payment of the arbitration award, RCG's claim for attorney's fees must also be extinguished. However, LOTN is simply wrong, and the case law it cites is immaterial. In actuality, under the CLA, Ronnisch's lien arose at the time it made improvements to LOTN's property; and at the same time, Ronnisch also became entitled to rights under the CLA including the right to claim attorneys' fees and costs. LOTN's payment of the arbitration award only resolve the payment of the hundreds of thousands of dollars LOTN had withholding for years, but it did not "resolve" Ronnisch's right to claim attorneys' fees under the CLA.

[13] RCG's Construction Lien was also Exhibit 13 in the arbitration.

recorded within 90 days of last work. In this matter, the real property is located on Nine Mile Road in the City of Ferndale in Oakland County, and RCG's claim of lien was recorded on June 2, 2009 with the Oakland County Register of Deeds (*i.e.,* which is well within 90 days of last working on April 24, 2009). Further, note the following which also show RCG's work being performed within 90 days prior to the recording of the construction lien:

a) RCG Meeting Minutes No. 68 dated April 15, 2009 (**App 9b-13b** which was part of Exhibit 21 in the arbitration);

b) City of Ferndale Inspection Reports dated April 14 and 16, 2009 (**App. 14b** which was part of Exhibit 11 in the arbitration)

c) City of Ferndale Approvals dated April 7, 9 and 13, 2009 and May 28, 2009 (**App. 15b-18b** which was part of Exhibit 11 in the arbitration)

d) City of Ferndale Certificates of Occupancy dated May 4 and May 29, 2009 (**App. 19b-40b** which was part of Exhibit 11 in the arbitration)

In sum, the issue of the proper amount due RCG from LOTN (and therefore, the value of RCG's construction lien) was determined in the arbitration of the contact from which the lien arose,[14] and as such, RCG has had a valid and proper construction lien against the real property of the Lofts on the Nine Project and the lien was perfected on June 2, 2009 when it was timely recorded with the Oakland County Register of Deeds.

[14] As held by the Court of Appeals, the Circuit Court also erred when it found that "the Arbitrator ruled solely upon RCG's contract claim". *Opinion and Order of Circuit Court* at page 7. As recognized by the Court of Appeals, the amount remaining due under the contract is not merely the "contract claim", the arbitration is also necessarily the litigation of the value of the construction lien, see MCL § 570.1107(1) and (6). *Opinion of the Court of Appeals* at page 6, F.N. 7. In that regard, the CLA does not permit a party to have a construction lien unless it makes an "improvement" to real property "pursuant to a contract", and therefore, the lien and the contract are inextricably intertwined. MCL § 570.1104(7) and MCL § 570.1107(1). Moreover, the Arbitrator recognized RCG's construction lien when he expressly reserved the issue of attorney fees and costs under MCL § 570.1118(2) for the Circuit Court.

C. **Under the CLA, Ronnisch Construction is "a Lien Claimant who is the prevailing party", and Ronnisch Construction was Entitled to Seek an Award of its Actual Attorneys' Fees and Litigation "Expenses" per MCL § 570.1118(2) and the Applicable Case Law.**

RCG is entitled to seek reimbursement of its attorneys' fees and costs under the Michigan Construction Lien Act. Specifically, MCL § 570.1118(2) requires that:

> In each action in which enforcement of a construction lien through foreclosure is sought, the court ***shall*** examine ***each claim*** and defense that is presented, and determine the amount, if any due to each lien claimant or to any mortgagee or holder of an encumbrance, and their respective priorities. ***The court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party.*** (*emphasis added*).

Of course, one of RCG's "claims" was for its attorneys' fees and costs which are specifically listed in Count II, "Foreclosure of Lien", of Ronnisch's Complaint at its Paragraph 39 and the prayer for relief. And note that the statute does not limit an award of attorney fees to only those incurred in an actual foreclosure of the property. To the contrary, the statute pertains to "any ***action*** in which enforcement of a construction lien through foreclosure is sought".[15] The statute also does not require that the property actually be foreclosed upon because it states, "the court ***shall*** examine ***each claim*** and defense that is presented, and determine the amount, if any due to each lien claimant or to any mortgagee or holder of an encumbrance, ***and their respective priorities***". This sentence includes three important issues: (i) the statutes mandates that the Court ***shall*** examine RCG's claims which includes its claim for attorney fees (the other claims having been conclusively determined in

[15] LOTN argues for this Court to place a very narrow interpretation on the term "action" suggesting that an "action in which enforcement of a construction lien through foreclosure is sought" means only the actual sale of the property by foreclosure. This argument is both contrary to the statutory requirement that the CLA be "liberally construed to secure the beneficial results, intents, and purposes of this act" (MCL § 570.1302), it also is contrary to the Michigan Court Rules which defines "actions" as "a civil action" "commenced by filing a complaint" (MCR 2.101) which includes all claims within the complaint (*i.e.*, in this matter, RCG claims under the CLA for enforcement of the construction lien through foreclosure and damages for breach of the contract from which the lien arose).

arbitration)[16], (ii) the statute requires the Court to determine the amount due to each lien claimant on its claims (which would include any award of attorneys' fees), and (iii) the statute contemplates that such determinations by the Court would occur prior to actually foreclosing on the property because the statute also requires the Court to determine the "respective priorities" of the parties with an interest in the property. (See also, MCL § 570.1121(1) which states that "the Court may enter a judgment ordering the sale" of the property if "the amount adjudged to be due has not been paid".) In short, RCG's "lien foreclosure action" includes all of Ronnisch's claims in this matter including: (a) the breach of contract claim that was subject to binding arbitration, (b) RCG's claim for attorney fees and costs, and (c) if it had been necessary, the sale of the property by foreclosure.

But in contravention of the statute, the Circuit Court erroneously held that it did not have discretion to hear RCG's claim for attorneys' fees and costs, and thus, RCG's lien foreclosure action was left unresolved by the Court.

Importantly, a prevailing lien claimant's right to claim attorneys' fees under MCL § 570.1118(2)[17] has been recognized in numerous Michigan cases including Vugterveen Systems, Inc. v. Olde Millpond Corp., 454 Mich. 119, 560 N.W.2d 43 (1997) which held:

The act contains an attorney-fee provision, which provides:

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[16] The fact that RCG's breach of contract claim that was part of this lien foreclosure action was subject to binding arbitration should be immaterial, and the arbitration of a contract claim within a larger lien foreclosure action is not prohibited by the CLA.

[17] We recognize that MCL § 570.1118(2) states that "the Court ***may*** allow reasonable attorney fees", however, we submit that under Vugterveen and related case law, and using a liberal construction of the CLA to protect the interests of prevailing lien claimants, we submit that the Circuit Court in this matter "should" grant RCG its actual attorney fees to protect RCG against the evil or mischief of LOTN withholding so much money for such a long period. Moreover, we note that while LOTN's Brief argues that the Circuit Court did not "abuse its discretion" in refusing to grant an award of attorney fees (claiming that LOTN's refusal to pay RCG was "reasonable), in actuality, the Circuit Court refused to exercise any discretion and simply (and incorrectly) held that RCG was not a "prevailing party" as a result of the Circuit Court's narrow reading of the CLA. Further, LOTN's refusal to pay hundreds of thousands of dollars due to RCG cannot be seen as "reasonable" within the remedial nature of the CLA (and contrary to LOTN's Brief, the Arbitrator never "affirmed" or "validated" "the reasonableness of LON's challenge to RCG's demand for final payment" – such argument is simply false – see the Arbitration Award at **App. 93a-95a**).

> The court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party. The court also may allow reasonable attorneys' fees to a prevailing defendant if the court determines the lien claimant's action to enforce a construction lien under this section was vexatious. [M.C.L. § 570.1118(2); M.S.A. § 26.316(118)(2).]
>
> Thus, the act distinguishes between a lien claimant and a defendant. A court has discretion to award attorney fees to a prevailing lien claimant, but may only award attorney fees to a prevailing defendant if the suit was vexatious. M.C.L. § 570.1118(2); M.S.A. § 26.316(118)(2).
>
> ***
>
> [*I*]*f Vugterveen is determined to be the prevailing party, the trial court's award of attorney fees should be reinstated.* Despite the contention of Olde Millpond, the trial judge conducted a thorough determination of the reasonableness of the fees. We find no abuse of discretion.
>
> Thus, the award of attorney fees is vacated pending remand. ***If Vugterveen prevails on remand, the trial court's original award of attorney fees should be reinstated, along with any other appropriate attorney fees or costs.*** *(Emphasis added.)*

Thus, under Michigan law, if a party is a "prevailing lien claimant", it is entitled to seek an award of its attorneys' fees and costs, and per the holding of the Court of Appeals, RCG was a prevailing lien claimant. Further, Michigan Courts have consistently recognized that:

> ***The Construction Lien Act is a remedial statute that sets forth a comprehensive scheme aimed at protecting "the rights of lien claimants to payment for expenses*** and ... the rights of property owners from paying twice for these expenses." ***It is to be liberally construed "to secure the beneficial results, intents, and purposes" of the act.***
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> Stock Bldg. Supply, LLC v. Parsley Homes of Mazuchet Harbor, LLC, 291 Mich.App. 403, 406-407, 804 N.W.2d 898 (2011) *(emphasis added, citations omitted).*

LOTN forced Ronnisch Construction to incur substantial attorneys' fees and costs to pursue LOTN for payment. RCG was also been forced to defend itself against numerous unfounded and inflated counterclaims asserted by LOTN which total approximately $2 million (*i.e.,* LOTN sought

to negate RCG's claim for over $600,000 plus requested an award in its favor of over $1.4 million). In addition, LOTN engaged in highly aggressive litigation tactics that dramatically increased the litigation costs to Ronnisch Construction.[18] And the Circuit Court even held that Ronnisch Construction perfected its lien under the requirements of the CLA.

RCG was forced to incur attorneys' fees of $227,343.99 in the two consolidated Court cases and the arbitration of this matter (see the Affidavit of Mark D. Sassak and the attached invoices and statement of Deneweth, Dugan & Parfitt at **(App. 41b-124b)** which show a detailed breakdown by time and task as to the legal services rendered). As held by the Court in Superior Products Co. v. Merucci Bros, Inc., 107 Mich.App. 153, 309 N.W.2d 188 (1981) at pages 159-160:

> Among factors that are appropriate to consider in assessing such fees are: (1) the complexity and difficulty of the case and the number of working hours which reasonably can be justified; and (2) whether the defendant's refusal to pay the claimed debt was unreasonable. Sturgis, *supra,* Bosch v. Altman, 100 Mich.App. 289, 298 N.W.2d 725 (1980).

In this matter, the actual attorneys' fees incurred are "reasonable" in light of the factors of the case which has been pending for over two years including the principal claim of RCG (which is in excess of $600,000) plus the various unfounded and inflated counter-claims of LOTN (which totaled approximately of $2 million). Further, the case involved numerous complex issues of fact

[18] Note that LOTN's current appeal is another example of its litigation tactics that have driven up the costs of this matter including: (a) the frivolous assertion in LOTN's Brief that RCG breached the construction contract by filing its lien foreclosure action (LOTN's Brief at page 1, F.N. 1, and page 25); (b) that "the Court of Appeals' Opinion abrogates the parties' bargain and inserts a fees shifting provision where none exists" (LOTN's Brief at page 25) which is patently false; (c) that "RCG received full payment on the Award without having to take any lien enforcement action" (LOTN's Brief at page 13) when in actuality, RCG was dragged through expensive and time consuming litigation, including the necessity of filing RCG's lien foreclosure action, to obtain payment for the improvements it made to LOTN's property; and (d) that "the Arbitrator issued the Award 'in full settlement of all claims and counterclaims submitted to this Arbitration'", (LOTN's Brief at page 13) which is a misleadingly selective quote by LOTN that omits the fact that the arbitrator expressly "reserved for the Circuit Court" the issue of RCG's claim for attorneys' fees and costs **(App. 93a-95a)**.

and technical materials also necessitating substantial attorney time. The complexities of the case were aggravated by LOTN's repeated failure to provide materials during discovery and by LOTN producing new documents on the eve of, and during, the arbitration hearings. In that same light, LOTN repeatedly changed the substance and magnitude of its counterclaims throughout the litigation including changing its damage amounts immediately prior to and during the arbitration. LOTN also adjourned the arbitration hearings on more than one occasion (to, among other things, replace its trial counsel). And, LOTN retained a new expert during the last full week of the summer 2011 arbitration hearings. The case was also submitted to a full trial of the facts in the arbitration hearings which spanned several weeks during the summer of 2011 and the matter was re-opened for continued arbitration hearings in December 2011 (with substantial additional discovery undertaken during the autumn of 2011). A listing of LOTN's counter-claims (as recounted by LOTN in its Closing Brief in the arbitration) is attached at **(App. 126b-127b)**[19], and a summary of the claims of RCG and the counter-claims of LOTN as recounted by RCG in the arbitration is attached at **(App. 128b-138b)**[20].

And, the hourly rate of $290 is reasonable in light of the experience and expertise of RCG's counsel. In that regard, Ronald Deneweth is a highly regarded construction lawyer with over 30 years of experience, and in that same light, Mark Sassak is both a licensed architect and construction lawyer with Juris Doctor, Master of Architecture, and Bachelor of Science in Architecture from the University of Michigan and over 15 years of experience in construction litigation.

The same factors also apply with respect to the "reasonableness" of the fees of Ronnisch Construction's expert, Benedetto Tiseo, FAIA. Mr. Tiseo is a highly regarded and experienced licensed architect (see Mr. Tiseo's *Curriculum Vitae* at **App. 139b-140b**). In that regard, he has designed numerous buildings, he is a professor of architecture at Lawrence Technological University,

[19] **App. 126b-127b** is page 31 and 32 of LOTN's Closing Brief in the arbitration.
[20] **App. 128b-138b** is Appendix 4 to RCG's Reply Brief in the arbitration.

and he is a Fellow of the American Institute of Architects. And, in this matter, Ronnisch Construction has been forced to incur expert fees in the amount of $56,306.26 (see the invoices and statement of Benedetto Tiseo, FAIA, NCARB, attached hereto at **App. 141b-148b**).

In sum, under the CLA, RCG was entitled to seek a Judgment from the Circuit Court against LOTN for RCG's attorneys' fees and costs (the "reasonable" amount of which RCG submits total $227,343.99 for attorneys' fees, $56,306.26 for expert fees and $26,475.00 for arbitration expenses paid to the American Arbitration Association to date, see **App. 149b**).

D. **Ronnisch's Claim for Attorneys' Fees Properly Includes All Fees in the Action Including Fees Incurred in Maintaining the Claim on the Contract From Which the Lien Arose.**

MCL § 570.1117(5) states, "In connection with an action for foreclosure of a construction lien, the lien claimant also may maintain an action on any contract from which the lien arose". And MCL § 570.1118(2) provides for the award of reasonable attorneys' fees to a prevailing lien claimant "in each action in which enforcement of a construction lien is sought". Thus, the CLA recognizes that the "contract from which the lien arose" is integral to the lien.[21] In determining the amount a prevailing lien claimant should be awarded as reasonable attorneys' fees, the CLA does not provide for the parsing of the lien claimant's claims under its action in which enforcement of a construction lien is sought.[22] To the contrary, the statute requires that "the court shall examine ***each claim*** and

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[21] See also MCL §§ 570.1103(4) and 570.1107 in which the CLA requires a contract in order for a lien claimant to have a valid construction lien.

[22] LOTN argues that even if RCG is the prevailing lien claimant, RCG's claim for attorneys' fees should be limited to only those fees incurred in the actual foreclosure of the property (and not the fees incurred arbitrating the contract from which the lien arose) (*LOTN's Brief* at 26). In support of is argument, LOTN cites to the **unpublished** holding of the Court of Appeals in J.L. Construction Co. v. Fairview Construction, Inc., COA Docket No. 182744, unpublished (Mich.App. 1997) (**App. 149a**). Of course, unpublished decisions of the Court of Appeals are not precedent. MCR 7.215(D). Moreover, we submit that J.L. Construction Co. v. Fairview Construction, Inc. was wrongly decided because the holding is not supported by the language of the CLA and it runs contrary to the CLA's mandate that the CLA "shall be liberally construed to secure the beneficial results, intents, and purposes of this act". MCL § 570.1302(1). We note that LOTN also cites to the unpublished decision of the Court of Appeals in Dwight Cook v. Landmark Delta, LLC, COA Docket No. 306421, unpublished (Mich.App. 2013)(**App. 152a**); however, Dwight

defense that is presented", and the statute does not limit the an award of attorneys' fees to only a the lien foreclosure claim. MCL § 570.1118(2), *emphasis added.*

Moreover, the decisions of this Honorable Court, and the published decisions of the Court of Appeals, do not provide for the parsing of a prevailing lien claimant's claim for attorneys' fees under the CLA. For example, in Vugterveen Systems, Inc. v. Olde Millpond Corp., 454 Mich. 119, 560 N.W.2d 43 (1997), this Court held that if the plaintiff contractor was found to be a prevailing lien claimant, "the trial court's original award of attorney fees should be reinstated along with any other appropriate attorney fees or costs". Id. at 133. Specifically, in Vugterveen, the jury found Vugterveen was entitled to a claim of lien which the trial court determined had a value of $6,896.16, and the trial court awarded Vugterveen attorney fees of $16,133.07 (*i.e.,* about double the lien amount with no parsing of the attorney fees with respect to the contractor's lien foreclosure and contract claim).

In that same light, see the Court of Appeals decision in Solutions Source, Inc. v. LPR Associates, Ltd. Partnership, 252 Mich.App. 368, 652 N.W.2d 474 (2002) in which the Court held at pages 382-382 (*citations omitted*):

> Defendants next assert that because a construction lien is an in rem action against real property, the trial court erred in entering the award of attorney fees as a personal judgment against defendants. ... It is true that an action to enforce a construction lien through foreclosure is an in rem proceeding. However, we do not believe that M.C.L. § 570.1118(2) requires an award of attorney fees to be entered only against the real property, forcing the prevailing lien claimant to foreclose on the defendant's property in order to collect its attorney fees.

The CLA provides that a prevailing lien claimant may be awarded its reasonable attorneys' fees "in each ***action*** in which enforcement of a construction lien is sought". RCG sought its

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Cook is also inapplicable to this matter in that it pertains to an unlicensed residential home builder/lien claimant who was prohibited from making certain claims because of his failure to abide by the applicable licensing laws – all of which are not at issue in this matter.

attorneys' fees in this ***action***, which action also sought enforcement of RCG's construction lien, and RCG should be entitled to its reasonable attorneys' fees for all aspects of this action including the arbitration of "the contract from which the lien arose".

E. **Ronnisch Construction Group Was Entitled to Seek Its Reasonable Attorneys' Fees of $227,343.99 Plus Expert Fees of $56,306.26 Plus AAA Costs of $26,475.00 Pursuant to MCL § 570.1118(2).**

Even though the Circuit Court (erroneously) denied RCG's request for attorneys' fees and costs, the Circuit Court nonetheless found that "RCG perfected its lien within the timeline required under Michigan law". *Opinion and Order of the Circuit Court* at page 5. And under Michigan law, "the amount of the lien is determined by the terms of the contract". Michigan Pipe & Valve-Lansing, Inc. v. Hebeler Enterprises, Inc., 292 Mich.App. 479, 487, 808 N.W.2d 323 (2011) (see also, Erb Lumber Co. v. Homeowner Const. Lien Recovery Fund, 206 Mich.App. 716, 722, 522 N.W.2d 917 (1994), *holding "the terms of the contract ... establish the size of the lien"*). It is undisputed that the arbitrator ruled on the terms of the contract in this matter, and the arbitrator Awarded RCG the net amount of $450,820.36. Thus, RCG had a perfected lien in the amount of $450,820.36. And Michigan Courts hold that ***if "plaintiff is entitled to a lien, plaintiff is the prevailing party"***. Schuster Construction Services v. Painia Development Corp., 251 Mich.App. 227, 238, 651 N.W.2d 749 (2002). Also, it has long been held that "once a lien attaches, a liberal construction should be made of the statute because of its remedial character". Wallich Lumber Co. v. Golds, 375 Mich. 323, 326, 134, N.W.2d 722 (1965). Thus, under the facts of this matter as found by the arbitrator and the Circuit Court, the Court of Appeals correctly held that RCG "was a prevailing lien claimant under MCL 570.1118(2)".[23] *Opinion of Court of Appeals* at page 7.

[23] LOTN incorrectly characterizes the proper **legal holding** of the Court of Appeals as making improper "findings of fact" (see *LOTN's Brief* at page 22). But, LOTN's assertion is simply false; in actuality, all fact finding was done by the arbitrator and by the Circuit Court. And, the Court of Appeals made its proper legal holdings in accordance with those factual findings (and, of

As such, RCG is entitled to seek reimbursement of its attorneys' fees and costs per MCL § 570.1118(2) which states that a prevailing lien claimant is entitled to also claim its reasonable attorneys' fees.[24] RCG's claim for its attorneys' fees and costs pursuant to MCL § 570.1118(2) is both reasonable and warranted by law.

RCG provided the Circuit Court with detailed statements of its attorneys' fees, expert fees and costs which are reasonable in light of LOTN's wrongful withholding of payment, the complexity of the case, LOTN's numerous unfounded and inflated counterclaims, and LOTN's other litigation tactics.[25]

F. **The Circuit Court Erred When It Held that LOTN's Post-Arbitration Payment of the Principal Amount of the Arbitration Award was a Bar to RCG Also Making Its Claim for an Award of Attorneys' Fees and Costs Under the CLA.**

LOTN attempted to avoid RCG's attorney fee claim by finally making payment to RCG after the arbitrator rendered its Award. In the *Opinion of the Court of Appeals* at pages 4-5, the Court correctly reasoned:

> We conclude that this case is analogous to the situation presented in Bosch v Altman Constr Corp, 100 Mich App 289; 298 NW2d 725

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course, the Court of Appeals reviews the Circuit Court's legal conclusions under a *de novo* standard). Further, LOTN incorrectly argues that nothing in the CLA "provides that a lien claimant achieves 'prevailing party' status by obtaining a net award in its favor equal to a given percentage of its lien claim". (Brief of LOTN at page 23). But, LOTN ignores that Michigan case law has long held that "if plaintiff is entitled to a lien, it is the prevailing party". Schuster Construction v. Painia Development at 238. In other words, the purpose of the CLA is to ensure that unpaid contractors get paid for their work (and the argument as to "percentages" of any lien claim is immaterial to an unpaid lien claimant's right to also claim attorney fees under the CLA).

[24] Note the long line of cases granting a prevailing lien claimant its attorney fees and costs from River Rouge Savings Bank v. Victor Building Co., 359 Mich. 189, 101 N.W.2d 260 (1960) to Vugterveen Systems, Inc. v. Olde Millpond Corp., 454 Mich. 119, 560 N.W.2d 43 (1997).

[25] "Among the factors that are appropriate to consider in assessing such fees are: (1) the complexity and difficulty of the case and the number of working hours which reasonably can be justified; and (2) whether the defendant's refusal to pay the claimed debt was unreasonable." Superior Products Co. v. Merucci Bros., Inc., 107 Mich.App. 153, 160, 309 N.W.2d 188 (1981). In that regard, the Merucci Court held that a matter with multiple parties, numerous motions and discovery proceedings, complex procedural issues and a lengthy time over which the litigation transpired all contribute in favor of an award of the prevailing lien claimant's actual attorney fees – and, all such factors of litigation complexity are present in this matter.

(1980), where this Court affirmed the award of attorney fees under the Mechanics' Lien Act. In Bosch, the plaintiff filed a lien for $8,215.08 for money owed on a construction contract. Id. at 292. A year later, the plaintiff filed an action to foreclose on the lien. Id. A few months after that, the plaintiff filed another suit against the defendant—this time alleging breach of contract. Id. at 293. Following a jury trial on the breach of contract claim, judgment was entered in favor of the plaintiff for $6,013.67. Id. After this judgment, the defendant tendered payment, but the plaintiff refused because he thought he was entitled to attorney fees as well. Id.

The Bosch trial court then ordered the plaintiff to execute a discharge of the lien upon payment of the district court judgment. Id. And on the morning of trial, the defendant tendered a check to the plaintiff in the amount of the district court judgment plus interest. Id. Consequently, the plaintiff signed a satisfaction of judgment and a discharge of the lien. Id. At the trial court, the plaintiff still asserted that he was owed attorney fees. Id. The defendant argued that, because the lien was satisfied before trial commenced, the trial court lacked the authority to award any attorney fees. Id. This Court disagreed with the defendant and stated:

> We believe it would clearly violate the spirit of the mechanics' lien statute to permit a lienee to force a lienor to accept payment of a lien claim just before the commencement of a lien foreclosure trial and thereby avoid a possible assessment for attorney fees. Under such a rule, a lienee could drag a lienor through costly pretrial proceedings in the hope of gaining a beneficial settlement without putting himself in jeopardy of paying the attorney fees of the lienor. Many a materialman, lacking in deep financial resources, would be seriously hampered in pursuing his legal remedies. The purpose of MCL 570.12 [predecessor of MCL 570.1118(2)] is to avoid such a situation. [Id. at 296.]

The facts in the instant case are remarkably similar to those in Bosch. Like the Bosch plaintiff, plaintiff here filed both a breach of contract claim and a claim for foreclosure of lien against defendant. And similar to Bosch, the amount that was owed under the contract/lien was established in a proceeding distinct from any actual lien foreclosure proceeding. Notably, in both Bosch and our case, the amount finally determined to be owed was less than the initial amount claimed on the lien. And finally, the defendants in both cases paid the amount determined to be ultimately owed under the contract before any lien foreclosure proceedings commenced. As a result, we conclude that the instant case is entitled to the same outcome as Bosch. Specifically, contrary to the circuit court's view, plaintiff substantially prevailing on the amounts it sought under the

> claim of lien made it a prevailing party under the Construction Lien Act, and the circuit court had the discretion under MCL 570.1118(2) to award attorney fees.

With respect to the foregoing, RCG acknowledges that on February 16, 2012, LOTN sent $485,319.74 via wire transfer to the Deneweth, Dugan & Parfitt Client Trust Account. By agreement of counsel for the parties, this payment was permitted to be received only so that interest on the award would cease, however, the parties understood and agreed that the issue of RCG's request for attorneys' fees and costs under the Construction Lien Act (and the Arbitration Award) was preserved and that RCG was not waiving any of its rights therefor by permitting the payment to be made. *E.g.,* see the attached email exchange between counsel for RCG and LOTN (**App. 150b-153b**).

Moreover, Michigan Courts have long recognized that a non-paying property owner cannot drag a contractor that improved its real property through extensive litigation only to make payment at the eleventh hour and thereby avoid liability for reasonable attorneys' fees under the Construction Lien Act. In that regard, the Court in Bosch v. Altman Construction Corp., 100 Mich.App. 289, 298 N.W.2d 725 (1980)[26] held at page 296:

> We believe it would clearly violate the spirit of the mechanic's lien statute to permit a lienee to force a lienor to accept payment of a lien claim just before the commencement of a lien foreclosure trial and thereby avoid a possible assessment for attorney fees. Under such a rule, a lienee could drag a lienor through costly pretrial proceedings in the hope of gaining a beneficial settlement without putting himself in jeopardy of paying the attorney fees of the lienor. Many a materialman, lacking in deep financial resources, would be seriously

[26] Although Bosch was decided under the old Mechanics' Lien Act (the forerunner to the Construction Lien Act), Mechanics' Lien Act holdings remain applicable to current Construction Lien Act matters. *E.g.,* see Brown Plumbing and Heating, Inc. v. Homeowner Const. Lien Recovery Fund, 442 Mich. 179, 500 N.W.2d 733 (1993) in which the Supreme Court noted at page 190 that it would interpret the Construction Lien Act in the same manner as the old Mechanics' Lien Act because "virtually all of the sections of the former mechanics' lien act are not contained within parts 1 and 3 of the Construction Lien Act".

> hampered in pursuing his legal remedies. The purpose of [the statute] is to avoid such a situation.[27]

Similarly, the Court in Solution Source, Inc. v. LPR Associates Ltd. Partnership, 252 Mich.App. 368, 652 N.W.2d 474 (2002) followed Bosch and extended its holding under the Construction Lien Act. Specifically, in Solution Source the Defendant also argued that plaintiff waived its right to attorneys' fees by accepting payment in satisfaction of the outstanding judgment. In response, the Court held at pages 379-381:

> We disagree and believe that Bosch actually supports the opposite conclusion.
>
> This Court's decision in Bosch stands for the proposition that if a construction lien has not been satisfied or discharged before trial, a court still has jurisdiction to award attorney fees in relation to enforcement or collection of the lien.
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> ***
>
> While Bosch is distinguishable in that defendants in this case did not tender payment before the foreclosure trial, but rather postjudgment, the Court's reasoning is analogous. In this case, defendants tendered payment four years after the final judgment was entered. Plaintiff incurred significant legal fees over that time in defending the judgment on appeal and attempting to collect on the judgment. Given that we concluded that lien claimants are entitled to recover appellate and postjudgment attorney fees, if we allowed a lienee to avoid liability for attorney fees simply by eventually satisfying the judgment, the lienee could drag the lien claimant through protracted postjudgment litigation without the risk of being assessed attorney fees.
>
> A lien claimant without significant financial resources could end up being forced to abandon his valid lien claim if met with resistance from the lienor at every turn. We believe that this is contrary to the purpose of the attorney fee provision of the Construction Lien Act. ***Therefore, we hold that satisfaction of a lien does not bar a lien***

[27] LOTN wrongly contends that parties to a construction contract "are entitled to dispute issues ***in good faith*** without exposure to incurring attorneys' fees" (*emphasis added*). RCG disputes LOTN's withholding of payment was done "in good faith", but regardless, the CLA was drafted with the opposite purpose in mind; to wit, if an owner whose property has been improved by a contractor does not pay for the improvement, that non-paying owner is absolutely to be exposed to incurring the other party's attorneys' fees and costs. There is no "good faith" exception under MCL §570.1118(2). And, MCL § 570.1115 states "a person shall not require, as part of any contract for an improvement, that the right to a construction lien be waived in advance of work performed".

> ***claimant who is the prevailing party from recovering its appellate and postjudgment attorney fees incurred in connection with enforcement of its lien.*** Thus, defendants' satisfaction of the judgment four years after the judgment was entered did not bar plaintiff from recovering appellate and postjudgment attorney fees. *(Emphasis added.)*

But, LOTN failed to pay the balance due RCG for its work, and LOTN has had beneficial use of the completed Project by at least May of 2009 (*e.g.*, see the Certificates of Occupancy at **App. 19b-40b**). And since that time, LOTN dragged RCG through protracted litigation and asserted approximately $2 million in counter-claims that were substantially rejected by the arbitrator (see **App. 93a-95a, App. 126b-127b and App. 128b-138b**). Further, under MCL § 570.1302, "the act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and purposes of this act", and under MCL § 570.1118(2) and Vugterveen Systems, Inc. v. Olde Millpond Corp., 454 Mich. 119, 560 N.W.2d 43 (1997), a lien claimant who is a prevailing party is entitled to seek an award of its reasonable attorneys' fees and costs. As stated in Solution Source at page 373-374:

> This view is consistent with the remedial nature of the Construction Lien Act, which is to be construed liberally to "secure the beneficial results, intents, and purposes of this act." MCL 570.1302(1). ***The act is designed to protect the rights of lien claimants to payment for expenses*** and to protect the rights of property owners from paying twice for these expenses. Old Kent Bank of Kalamazoo v. Whitaker Constr. Co., 222 Mich.App. 436, 438-439, 566 N.W.2d 1 (1997).[28] *(Emphasis added.)*

In sum, the Court of Appeals correctly held that the Circuit Court erred and should have permitted RCG to seek its actual attorneys' fees and costs per MCL § 570.1118(2).

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[28] Note that the Court in Solution Source went even one further step in holding that the remedial nature of the CLA provided for the award of **all** such attorney fees and costs to a prevailing lien claimant when it stated, "***because the Construction Lien Act does not specifically limit recovery of attorney fees*** incurred before a judgment and in keeping with the purpose of attorney fee provisions, we hold that the Legislature intended that ***appellate and postjudgment attorney fees would be recoverable under the statute***". Id. at 375. *(Emphasis added.)*

II. THE MICHIGAN SUPREME COURT SHOULD HOLD THAT THE COURT OF APPEALS PROPERLY CONSIDERED AND DISTINGUISHED THE SUPREME COURT'S DECISION IN *H.A. SMITH LUMBER & HARDWARE CO. V. DECINA*, 480 MICH. 987 (2007) IN LIGHT OF THE DIFFERING FACTS OF THE TWO CASES AND AFFIRM THAT THE COURT OF APPEALS CORRECTLY HELD THAT THE PLAINTIFF CONTRACTOR WAS ENTITLED TO AN AWARD OF ATTORNEY FEES AS A "PREVAILING PARTY" UNDER MCL § 570.1118(2) IN LIGHT OF THE STATUTORY MANDATE TO LIBERALLY CONSTRUE THE CLA TO PROTECT PREVAILING LIEN CLAIMANTS.

And in our case, the Court of Appeals further stated at pages 6-7 of its *Opinion*:

> The fact that the no foreclosure ever occurred is not pertinent. In addition to Bosch, this Court has already rejected this position in Solution Source, Inc v LPR Associates Ltd Partnership, 252 Mich App 368; 652 NW2d 474 (2002). In Solution Source, the defendants argued that because the plaintiff attempted to satisfy its judgment through garnishment instead of through foreclosure, the plaintiff could not utilize MCL 570.1118(2) to recover attorney fees. This Court disagreed and, while noting that the statute is to be construed liberally in order to carry out its intended purpose of protecting lien claimants, determined that MCL 570.1118(2) "was not meant to be read in such a restrictive manner." Id. at 378. The Court explained,
>
> > In stating that a lien claimant who is a prevailing party in an action to enforce a construction lien through foreclosure is entitled to attorney fees, we believe that MCL 570.1118(2) is simply distinguishing between an action based *solely* in contract and one based on a construction lien. These actions are distinct and separate and may be pursued simultaneously. [Id. (emphasis added).]
>
> Here, plaintiff did not *solely* seek recovery on a breach of contract claim: plaintiff's complaint listed both a contract claim and a foreclosure of lien claim. As explained previously, the fact that the amount owed on the contract, and consequently the proper amount of the lien,[7] was determined in a separate proceeding is of no consequence.
>
> We agree with the Solution Source Court, which, while relying on the reasoning in Bosch, noted that the entire purpose of the Construction Lien Act could be thwarted if lienors were able to fight valid liens in the hope that the lien claimants would run out of resources to continue their pursuit and then only pay right before trial in an attempt to circumvent MCL 570.1118(2)'s attorney-fee provision. Solution Source, 252 Mich App at 381. Accordingly, not

> allowing the award of attorney fees just because a lienor pays off a lien before a court actually rules on a lien claimant's claim of foreclosure would be contrary to the purpose of the Act. See id. (stating that "satisfaction of a lien does not bar a lien claimant who is a prevailing party from recovering its appellate and postjudgment attorney fees incurred in connection with enforcement of its lien"); Bosch, 100 Mich App at 296.
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> *F.N. 6: In Bosch, the plaintiff received a judgment for $6,013.67, which was 73.2 percent of the amount it claimed on the lien. In our case, as noted earlier, plaintiff's arbitration award was 72.0 percent of the amount claimed on its lien.*
>
> *F.N. 7: The amounts owed on a contract and on a lien are inextricably linked. MCL 570.1107(1) provides that "[a] construction lien acquired pursuant to this act shall not exceed the amount of the lien claimant's contract less payments made on the contract." See also CD Barnes, 300 Mich App at 419, 427. And MCL 570.1107(6) provides that "[i]f the real property of an owner or lessee is subject to multiple construction liens, the sum of the construction liens shall not exceed the amount the owner or lessee agreed to pay the person with whom he or she contracted for . . . less payments made by or on behalf of the owner or lessee . . . ."*

A. **The Court of Appeals Properly Held that Circuit Court Erroneously Relied on *H.A. Smith Lumber v. Decina*, the Court of Appeals Correctly Distinguished *Decina* from this Matter, and *Decina* is Inapplicable to this Matter Because the Putative Lien Claimants in *Decina* "Lost on their Lien Claim" Whereas in this Matter, Although the Circuit Court Found that "RCG perfected its lien", the Circuit Court Never Resolved RCG's Foreclosure of Lien Claim.**

In its July 24, 2014 *Opinion of the Court of Appeals* at page 6, the Court correctly distinguished HA Smith Lumber v. Decina from this matter and reasoned:

> Defendant's and the circuit court's reliance on HA Smith Lumber & Hardware Co v Decina, 480 Mich 987; 742 NW2d 120 (2007), is misplaced. In an order, our Supreme Court in Decina ruled that the subcontractor plaintiffs were not able to recover attorney fees under the Construction Lien Act because they did not "prevail on [their] lien foreclosure action." But the facts in Decina are easily distinguishable because the subcontractors had liens that *never attached to the property.* HA Smith Lumber & Hardware Co v Decina, 258 Mich App 419, 424, 431; 670 NW2d 729 (2003), vacated in part 471 Mich 925 (2004). The liens could not attach because the homeowners, who contracted with the general contractor, had paid the entire contract amount. Id.; see also MCL 570.1107(1),

> (6) (describing that any lien amount cannot exceed the amounts owed on the original construction contract). Accordingly, the Supreme Court aptly concluded that in light of no lien legally being able to attach to the property, it was impossible for the subcontractors to have prevailed on their lien claim, which is a prerequisite for being able to collect attorney fees under MCL 570.1118(2).
>
> In the present case, it is undisputed that the landowner, defendant, did not pay the full amount of the contract price to the general contractor, plaintiff. Thus, these facts are distinguishable from those in Decina, and there was no question that plaintiff's lien had, indeed, attached to the subject property. Thus, we conclude that the Supreme Court's decision in Decina simply is not applicable.

The Court of Appeals correctly noted that matter of H.A. Smith Lumber & Hardware Co. v. Decina, 480 Mich. 987, 742 N.W.2d 120 (2007) is not on-point and is inapplicable to this matter.[29] Note that in Decina, the Supreme Court held that "[t]he subcontractor [lien claimant] ***lost on their lien*** claim but prevailed on the breach of contract claim". Id. at 988 *(emphasis added)*. But in this matter, it is undisputed that "neither the arbitrator nor the circuit court resolved the plaintiff's foreclosure of lien claim". See the *Order of the Supreme Court dated April 23, 2015* which granted leave to appeal in this matter and *Defendant-Appellant's Brief* at page 22. And of critical importance in distinguishing the two matters, note that the reason the lien claimants lost on their lien claim in Decina was because, as a matter of law, they never had a lien that could attach to the property. But in this matter, ***the Circuit Court found that Ronnisch had perfected its lien***. Unfortunately, the Circuit Court mistakenly believed it did not "have discretion to award RCG its attorney fees and costs under the Michigan Construction Lien Act", and the Circuit Court never resolved the foreclosure of lien claim.

[29] As noted by the Circuit Court in its Opinion and Order at Footnote 9, "In its recitation of the facts in the Decina line of cases, the [Supreme] Court cites to the Michigan Court of Appeals opinion [258 Mich.App. 419, 670 N.W.2d 729 (2003)] as the Michigan Supreme Court did not discuss the case's underlying facts in its Opinion." In that same regard, the facts of Decina as recited herein also are taken from the Court of Appeals' opinion in that matter.

Specifically, in Decina, the putative lien claimant was a ***subcontractor*** (*i.e.*, H.A. Smith was the lumber company that contracted with a General Contractor – Decina Co. – which contracted with the Project Homeowners named Lina and Lydia Gobis). And, in that regard, ***the Homeowners fully paid Decina***, however, ***Decina (the General Contractor) withheld payment from Smith***. In response, Smith recorded a claim of lien against the Homeowners' property, and Smith filed suit for lien foreclosure and breach of contract. Decina, 258 Mich.App. 419 at pages 422-424. In contrast, Ronnisch Construction was the general contractor that contracted directly with LOTN, and ***LOTN did not pay RCG*** for the improvements made to its property. Thus, whereas the Gobises were innocent homeowners whose general contractor withheld money from its subcontractors (and whose property was therefore improperly encumbered by the lien), LOTN was a breaching property owner that withheld payment from RCG for its work (and RCG's lien was entirely appropriate).

The distinction is critical because it means that whereas Smith was not entitled to a lien against the Gobises' property (as a matter of law), Ronnisch Construction had a valid lien against LOTN's property (which the Circuit Court found was perfected under the requirements of the CLA).[30] Further, the CLA directly addresses the payment issue raised in Decina (which is not at issue between RCG and LOTN): MCL § 570.1107 states at its part 1 that, "A construction lien acquired pursuant to this act ***shall not*** exceed the amount of the lien claimant's contract less payments made on the contract", and the statute states at its part 6, "If the real property of an owner … is subject to construction liens, the sum of the construction liens ***shall not*** exceed the amount

[30] LOTN ignores this critical distinction which renders Decina inapplicable to this matter. Specifically, whereas the Circuit Court found that "**RCG perfected its lien**" (*Opinion and Order of the Circuit Court* at page 5), and whereas the arbitrator's Award determined the amount of RCG's lien to be $450,820.36 (**App. 93a-95a**), the plaintiff in Decina was not entitled to any lien because the owner had paid in full for the improvements to the property (and per MCL 570.1107(6), a claim of lien may not exceed the amount of the owner's contract less the payments made by the owner).

which the owner … agreed to pay the person with whom he or she contracted for the improvement … less payment made by or on behalf of the owner…." *(emphasis added)*.

As such, the Court in Decina noted that "the Gobises paid Decina Co. in full"[31] so Smith's lien "did not attach to the Gobises' property". In other words, because the Homeowners had fully paid the general contractor Decina (*i.e.*, the party with whom they contracted), the subcontractor Smith (which subcontracted with Decina) was not permitted to have a lien against the real property because such a lien is expressly prohibited by MCL § 570.1107 (and as such, Smith could have no other rights under the CLA).[32] In contrast, Ronnisch Construction's lien did attach (as noted above), and the value of RCG's lien was adjudicated in the arbitration to be $450,820.36 – as such, RCG also had the statutory right to claim its attorneys' fees and costs.

Therefore, because ***Smith never had a construction lien*** that attached to the Gobises' property, the Supreme Court correctly held that Smith could not recover attorneys' fees under the CLA because, the Court held, "[t]he subcontractors lost on their lien claims but prevailed on the breach of contract claim." Decina, 480 Mich. 987 at page 988.[33] In contrast, the arbitrator found in

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[31] In this regard, note that there are two purposes behind the CLA: one is to ensure that contractors are paid for their improvements to real property, and the second is to ensure that owners do not have to pay twice for the work. Stock Bldg. Supply, LLC v. Parsley Homes of Mazuchet Harbor, LLC, 291 Mich.App. 403, 406-407, 804 N.W.2d 898 (2011). In Decina, the Homeowners fully paid for the work at their property; in our case LOTN did not pay RCG for the improvements to its property. Thus, Decina is a case that deals with the issue of ensuring that an owner does not have to pay twice, while our case deals with the issue of ensuring that an unpaid contractor receives payment together with the benefit its other rights under the statute.

[32] Note that Smith still had its non-CLA breach of contract claim that it could make against Decina, and Smith also had a claim against Decina for breach of the Michigan Builders Trust Fund Act (MCL §§ 570.151 *et seq.*) for Decina's failure to pass-on the monies that had been paid to it by the Homeowners for the benefit of Smith. However, neither claim is part of the CLA so Smith could not claim attorney fees under the CLA.

[33] In that same regard, the Supreme Court also noted that "if the subcontractors had chosen to bring their breach of contract claims against the general contractor as a separate action, they would not have been allowed to recover attorney fees" because the subcontractors did not have liens that attached to the Homeowner's property, and the "language of MCL 570.1118(2) does not permit recovery of attorney fees on the contract action merely because it was brought together with the lien foreclosure action" (and the lien claim subsequently fails). Decina, 480 Mich. 987 at 988.

his binding Arbitration Award that ***LOTN had failed to pay Ronnisch Construction $450,820.36*** and, as such, ***RCG had a perfected construction lien which attached to LOTN's real property in the amount of $450,820.36***. And it is clear that the arbitrator recognized that Ronnisch Construction had a lien against LOTN's property because he expressly reserved the statutory issue of attorneys' fees and costs under MCL § 570.1118(2) for the further decision by the Circuit Court.

Unfortunately, the Circuit Court mistakenly relied on Decina, 480 Mich. 987 to make its ruling at page 11 of its Opinion and Order when it held:

> As LOTN paid RCG the amount LOTN owed pursuant to the Arbitration Award on February 16, 2012 and RCG's lien foreclosure claim was not adjudicated by this Court[34] or the Arbitrator in the AAA case, RCG cannot be deemed to be a prevailing lien claimant in this matter. Therefore, ***the Court does not have the discretion to award RCG its attorney fees and costs under the Michigan Construction Lien Act***. *(Emphasis added.)*

It is clear from the Circuit Court's recitation of the facts and holdings in Decina that it misunderstood the Supreme Court's decision and it did not take note of (or did not appreciate the significance of) the important factual distinctions between Decina (as described by the Court of Appeals) and the facts in this matter. See *Opinion and Order of the Circuit Court* at pages 9-11.

Thus, Decina stands for the reasonable proposition that in order for a claimant to be able to avail itself of the statutory rights under the CLA and recover its attorney fees under MCL § 570.1118(2), the lien claimant must actually have had a legally perfected lien that attached to the real property of a non-paying owner (and such a lien is precisely what arose when LOTN failed to pay RCG for the improvements to LOTN's property). Under MCL § 570.1107(1), RCG's lien attached at the time the improvements were made, and the value of the lien was later adjudicated in the arbitration when the arbitrator found that LOTN owed RCG $450,820.36.

[34] Contrary to the apparent holding of the Circuit Court, nothing in the CLA requires that RCG have actually pushed its litigation through to the foreclosure of its lien (*i.e.*, forcing a sheriff's sale of the real property) to be entitled to attorney fees and costs. Instead, when RCG prevailed in the underlying arbitration, it became the "prevailing lien claimant" which is entitled to payment of the principal amount remaining due under the contract and an adjudication under MCL § 570.1118(2) as to its attorney fees and costs. See also Bosch and Solution Source which both recognize that a property owner's eleventh hour payment does not negate the lien claimant's statutory right to attorney fees and costs.

Thus, whereas the Gobises' fully paid their general contractor Decina (and therefore Decina's subcontractor Smith was not entitled to a construction lien or attorneys' fees under the CLA), LOTN did not pay Ronnisch Construction until after the conclusion of the litigation of the value of the construction lien (which lien was perfected and attached to LOTN's property). As such, the Court of Appeals properly held that Ronnisch Construction was entitled to seek an award of its attorneys' fees and costs under the CLA.

B. Even the Circuit Court Appears to have Recognized that Ronnisch Construction Would Be Entitled to Its Attorneys' Fees and Costs But for Its Misunderstanding of *Decina*.

Prior to its discussion of Decina, the Circuit Court's Opinion and Order appears to recognize that Ronnisch Construction should be entitled to its attorneys' fees and costs. Unfortunately, the Circuit Court (mistakenly) believed that Decina, 480 Mich. 987, required that it "***does not have discretion*** to award RCG its attorney fees and costs under the Michigan Construction Lien Act". *Opinion and Order of the Circuit Court* at page 11, (*emphasis added).*

In that regard, the Circuit Court correctly noted at length that:[35]

> The Michigan Court of Appeals has addressed instances where a lienee submitted its payment on a lien just before the lien foreclosure trial began or after the final judgment was entered. For example, the Michigan Court of Appeals held that:
>
> > [I]t would clearly violate the spirit of the mechanics' lien statute to permit a lienee to force a lienor to accept payment of a lien claim just before the commencement of a lien foreclosure trial and thereby avoid a possible assessment for attorney fees. Under such a rule, a lienee could drag a lienor through costly pretrial proceedings in the hope of gaining a beneficial settlement without putting himself in jeopardy of paying the attorney fees of the lienor. Many a materialman, lacking in deep financial resources, would be seriously hampered in pursuing his legal remedies. The purpose of MCL 570.12; MSA 26.292, is to avoid such a situation...

[35] The citation to the *Opinion and Order of the Circuit Court* is somewhat duplicative of the argument above regarding Bosch and Solution Source, however, it is cited here in full to show that it appears the Circuit Court appears to have understood that RCG would have been entitled to make its claim for attorney fees and costs but for the Circuit Court's misunderstanding as to Decina.

> We conclude that a lienor is not required to accept tender of payment after a complaint has been filed if he wishes to pursue his statutory right to attorney fees. In exercising his discretion under MCL 570.12; MSA 26.292, the trial judge could consider the stage of the proceedings at which the offer of payment was made and refused.

Bosch v Altman Constr Corp, 100 Mich App 289, 296-297 (1980).[8]

> FN. 8, Holdings related to the Mechanics' Lien Act (the forerunner to the Construction Lien Act) are applicable to Construction Lien Act matters as "[v]irtually all of the sections of the former mechanics' lien act are now contained within parts 1 and 3 of the Construction Lien Act." Brown Plumbing & Heating, Inc v Homeowner Constr Lien Recovery Fund, 442 Mich 179, 190 (1993).

In addition, the Michigan Court of Appeals commented on the Bosch decision in Solution Source v Lpr Assocs P'Ship, 252 Mich App 368 (2002), holding that:

> This Court's decision in Bosch stands for the proposition that if a construction lien has not been satisfied or discharged before trial, a court still has jurisdiction to award attorney fees in relation to enforcement or collection of the lien.
>
> ***
>
> While Bosch is distinguishable in that defendants in this case did not tender payment before the foreclosure trial, but rather postjudgment, the Court's reasoning is analogous. In this case, defendants tendered payment four years after the final judgment was entered. Plaintiff incurred significant legal fees over that time in defending the judgment on appeal and attempting to collect on the judgment. Given that we concluded that lien claimants are entitled to recover appellate and postjudgment attorney fees, if we allowed a lienee to avoid liability for attorney fees simply by eventually satisfying the judgment, the lienee could drag the lien claimant through protracted postjudgment litigation without the risk of being assessed attorney fees.
>
> A lien claimant without significant financial resources could end up being forced to abandon his valid lien claim if met with resistance from the lienor at every turn. We believe that this is contrary to the purpose of the attorney fee provision of the Construction Lien Act. Therefore, we hold that satisfaction of a lien does not bar a lien claimant who is the prevailing party from recovering its appellate and postjudgment attorney fees incurred in connection with

> enforcement of its lien. Thus, defendants' satisfaction of the judgment four years after the judgment was entered did not bar plaintiff from recovering appellate and postjudgment attorney fees. Id at 380-381 (citations omitted).

Opinion and Order of the Circuit Court at pages 7-9. Thus it seems apparent that, but for the Circuit Court's mistaken reliance on Decina, even the Circuit Court would have found Ronnisch Construction to be the prevailing lien claimant which is entitled to attorneys' fees and costs under the CLA. In any event, under the July 24, 2014 *Opinion of the Court of Appeals*, the Circuit Court now has proper direction that Ronnisch Construction ***is*** the prevailing lien claimant which ***is*** entitled to seek an award of its attorneys' fees and costs on remand.

III. THE OPINION OF THE COURT OF APPEALS IS PROPERLY IN ACCORD WITH THE POLICY UNDERLYING THE CONSTRUCTION LIEN ACT AND MICHIGAN'S POLICY IN FAVOR OF ARBITRATING CLAIMS.

A. Arbitration Provisions are Commonly Part of Industry Form Contracts Including Contracts from the American Institute of Architects, the Associated General Contractors of America, the Design-Build Institute of America and Others.

The contract between Ronnisch Construction and LOTN is based on a form agreement from the American Institute of Architects titled "Standard Form of Agreement Between Owner and Contractor", AIA Document A-111(1997 Edition). And, the AIA-A111 form follows the standard AIA practice by incorporating the "General Conditions for the Contract for Construction", AIA Document A-201(1997 Edition).[36] And, in that regard, the AIA-A201 includes an Arbitration Provision at Section 4.6 which states in relevant part:

> § 4.6.1 ***Any Claim*** ***arising out of or related to the Contract,*** except Claims relating to aesthetic effect and except those waived as provided for in Sections 4.3.10, 9.10.4 and 9.10.5, shall ... be

[36] Typically, the AIA form contracts incorporate the A201 General Conditions (including the agreements between Contractor and Owner, the agreements between Contractor and Subcontractor, and the agreements between Owner and Architect). Thus, all such AIA form contracts can contain the A201 arbitration provision. Of course, the parties could elect to negate the arbitration provision, however, encouraging such a practice would run counter to Michigan's long-standing policy in favor of arbitrating claims.

> subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Section 4.5. *(Emphasis added)*
>
> ***
>
> § 4.6.6 Judgment on Final Award. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. (See **App. 37a-38a**)

Thus, under §4.6.1 of the AIA-A201 form contract language, the value of RCG's lien (*i.e.*, the balance remaining due RCG for its work under the contract) was required to be decided in the arbitration (as was done) because the contract provision required that "***Any Claim** arising out of or related to the Contract* ... shall ... be subject to arbitration". Nowhere in this language is there any clause or suggestion that by signing the form contract with the arbitration provision that RCG would be losing its statutory right to seek attorneys' fees and costs under MCL § 570.1118(2).

Note also that substantially similar arbitration provisions are common in the form contracts of other construction industry organizations such as the "ConsensusDOCS" of the Associated General Contractors of America (the "AGC") (*e.g.,* ConsensusDOC 200 Owner/Contractor Agreement and General Conditions – which is analogous to the AIA-A101 Owner/Contractor Agreement) and the Design Build Institute of America (*e.g.,* DBIA Document No. 535, "Standard Form of General Conditions of Contract Between Owner and Design-Builder"). Moreover, the ConsensusDOCS are also endorsed by numerous other construction trade associations including the National Subcontractor's Alliance, the Construction Owners Association of America, and the Association of Specialty Contractors.

Thus, it is very likely that a Michigan construction lien claimant (whether a general contractor like RCG, a subcontractor or an architect) will have a contract with an arbitration provision, and as such, the *Court of Appeal's Opinion* is consistent with the purposes of the CLA and the statutory rights of any such lien claimant. Any lien claimant would still be required to abide by

all other aspect of the CLA (*e.g.*, providing the required "Sworn Statements", recording its claim of lien within 90-days of last work, etc.), and the *Opinion of the Court of Appeals* corrected the negative practical import of the Circuit Court's ruling (*i.e.*, under the Circuit Court's erroneous holding, a lien claimant with an arbitration provision would have unknowingly lost a key component of its rights under the CLA). And, while Michigan Courts have long held that a party can be free to waive its rights, "[a] true waiver is an intentional, voluntary act and cannot arise by implication. It has been defined as the voluntary relinquishment of a known right". Kelly v. Allegan County Circuit Judge, 382 Mich. 425, 427, 169 N.W.2d 916 (1969); and nothing in the arbitration provision is an express, voluntary relinquishment of the right to seek attorneys' fees and costs under the CLA.

B. The Opinion of the Court of Appeals is in Accord with Michigan's Express Policy Favoring Arbitration.

The *Opinion of the Court of Appeals* is in accordance with Michigan's long-standing policy in favor of arbitration. In that regard, the Courts have noted that "Michigan [has a] strong public policy favoring arbitration." Jozwiak v. Northern Michigan Hospitals, Inc., 207 Mich.App. 161, 165, 524 N.W.2d 250 (1994). And, the Courts have repeatedly held that "Arbitration is a well-established mechanism for dispute resolution which is highly favored by the courts." Moss v. Department of Mental Health, 159 Mich.App. 257, 264, 406 N.W.2d 203 (1987). Also, "Arbitration is looked upon with favor by the courts and it is the policy of the courts to construe liberally arbitration clauses and to resolve any doubts in favor of arbitration." Chippewa Val. Schools v. Hill, 62 Mich.App. 116, 120, 233 N.W.2d 208 (1975).

In that regard, the *Opinion of the Court of Appeals*, corrected the Circuit Court's holding which would have had a chilling and undermining effect on construction contractors using arbitration to adjudicate their claims (*i.e.*, under the Circuit Court's erroneous ruling, an Owner would have been able to withhold payment from a contractor with virtual impunity if it had an arbitration provision in the construction contract). Instead of being exposed to a lien claimant's

litigation costs as contemplated by the CLA, a non-paying Owner would be free to force the matter into arbitration, drag the contractor through protracted litigation (claiming they had a "good faith" dispute), take the chance that it might receive a favorable award, and in the event that the arbitrator were to rule against the non-paying Owner, merely tender payment of the arbitration award.

In that instance, the contractor would have little practical recourse but to accept the payment (which the non-paying Owner would have had the benefit of holding during the pendency of the litigation), or be forced into the absurd choice of declining payment and continuing to carry the burden of litigating without payment in the hope that it may be awarded its attorneys' fees in the future. Moreover, the contractor that declined payment would be exposed to counterclaims by the wrongful Owner that it failed to mitigate its damages (thus potentially depriving it of continuing interest) and that it was "running up" its attorneys' fees. Equally important, the contractor that declined payment would also be exposed to the potential that the funds initially tendered to pay the claim would not be available at a later date (*e.g.*, because the Owner used the funds for other purposes, became insolvent, entered bankruptcy, or for various other reasons that have become very real possibilities in today's uncertain economy).

Such an absurd choice would have been directly contrary to Michigan's policy favoring arbitration and the purpose of the CLA which is to ensure that contractors are paid for their work. Thus, the *Opinion of the Court of Appeals* properly corrected such deleterious consequences and is fully in accord with Michigan's policy in favor of arbitration.

C. The Opinion of the Court of Appeals is in Accord with the Express Policy of the Construction Lien Act.

The *Opinion of the Court of Appeals* properly recognizes the express policy of the CLA. (In contrast, the *Opinion and Order of the Circuit Court* does not rely on any section of the CLA.) And, the plain reading of the express statutory imperative requires that the CLA "is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and

purposes of this act" which includes protecting the rights of persons performing labor or providing materials or equipment for the improvement of real property. MCL § 570.1302. Moreover, statutes are not to be construed in a manner that leads to "absurd or unreasonable results". Luttrell at 106.

Unfortunately, the Circuit Court appears to have been confused by a misunderstanding of the Supreme Court's holding in Decina. But as noted by the Court of Appeals, Decina is inapplicable in that it was decided upon facts that are very different from the facts in this matter (i.e., the holding in Decina was made to protect an innocent homeowner from having to pay twice for the work performed at its property which is clearly not at issue in this matter). In this matter, LOTN withheld substantial payment from RCG for over two years, and RCG had a perfected lien which attached to LOTN's property and had a value of $450,820.36 (even after RCG defeated the vast majority of the approximately $2 million in counterclaims asserted by LOTN).

RCG was the prevailing lien claimant, and it had a ***statutory right*** to also claim its attorneys' fees under MCL § 570.1118(2) (in addition to RCG's entitled to payment from LOTN in the principal amount of the Arbitration Award). As recognized by the Court of Appeals, nothing in the CLA requires that RCG actually force its lien to foreclose against the real property of LOTN in order for RCG to avail itself of its statutory right to attorneys' fees. ("The fact that no foreclosure ever occurred is not pertinent." *Opinion of the Court of Appeals* at page 5.) And, it would have been a narrow, absurd and/or unreasonable interpretation of the statute to require that Ronnisch Construction reject LOTN's tender of payment of the principal amount of the Arbitration Award after having been dragged through two years of litigation and after having prevailed in the arbitration. No statutory reading, and certainly not a liberal construction of the statute to effectuate its purpose, would permit RCG to lose its statutory right to claim attorneys' fees merely because the

principal amount of the arbitration award was paid after the conclusion of the proceeding.[37] As noted in Pittsfield Charter Twp. v. Saline, 103 Mich.App. 99, 105, 302 N.W.2d 608 (1981), "A court must also ascertain 'the evil or mischief which it is designed to remedy, and will apply a reasonable construction which best accomplishes the statute's purpose.'"

CONCLUSION

For the reasons noted above, the *Opinion of the Court of Appeals* is correct in all of its particulars, and the July 24, 2014 judgment of the Court of Appeals should be **AFFIRMED**. This matter should be remanded to the Circuit Court so that Ronnisch Construction may seek its attorneys' fees and costs under the Construction Lien Act.

[37] To the extent LOTN might claim that RCG's post-award acceptance of payment was a waiver of its statutory rights, we submit that as a matter of law, RCG's actions could not have been such a waiver. And as previously noted, while a party can be free to waive its rights, Michigan Courts hold that "[a] true waiver is an intentional, voluntary act and cannot arise by implication. It has been defined as the voluntary relinquishment of a known right." Kelly v. Allegan County Circuit Judge, 382 Mich. 425, 427, 169 N.W.2d 916 (1969). "[C]onduct that does not express any intent to relinquish a known right is not a waiver, and a waiver cannot be inferred by mere silence." Moore v. First Security Cas. Co., 224 Mich.App. 370, 376, 568 N.W.2d 841 (1997). RCG never waived its statutory right to attorney fees and costs, and the arbitrator expressly reserved that issue for decision by the Circuit Court.

RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellee, Ronnisch Construction Group, Inc., requests that this Honorable Court **AFFIRM** the July 24, 2014 judgment of the Court of Appeals, order that Ronnisch Construction Group, Inc. be entitled to an award of its reasonable attorneys' fees and costs incurred in the entirety of this action (including the arbitration of the contract from which the lien arose), and order that this matter be remanded to the Circuit Court for proceedings consistent therewith.

Respectfully submitted,

DENEWETH, DUGAN & PARFITT, P.C.

/s/ Mark D. Sassak

Dated: July 21, 2015 By: _____

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